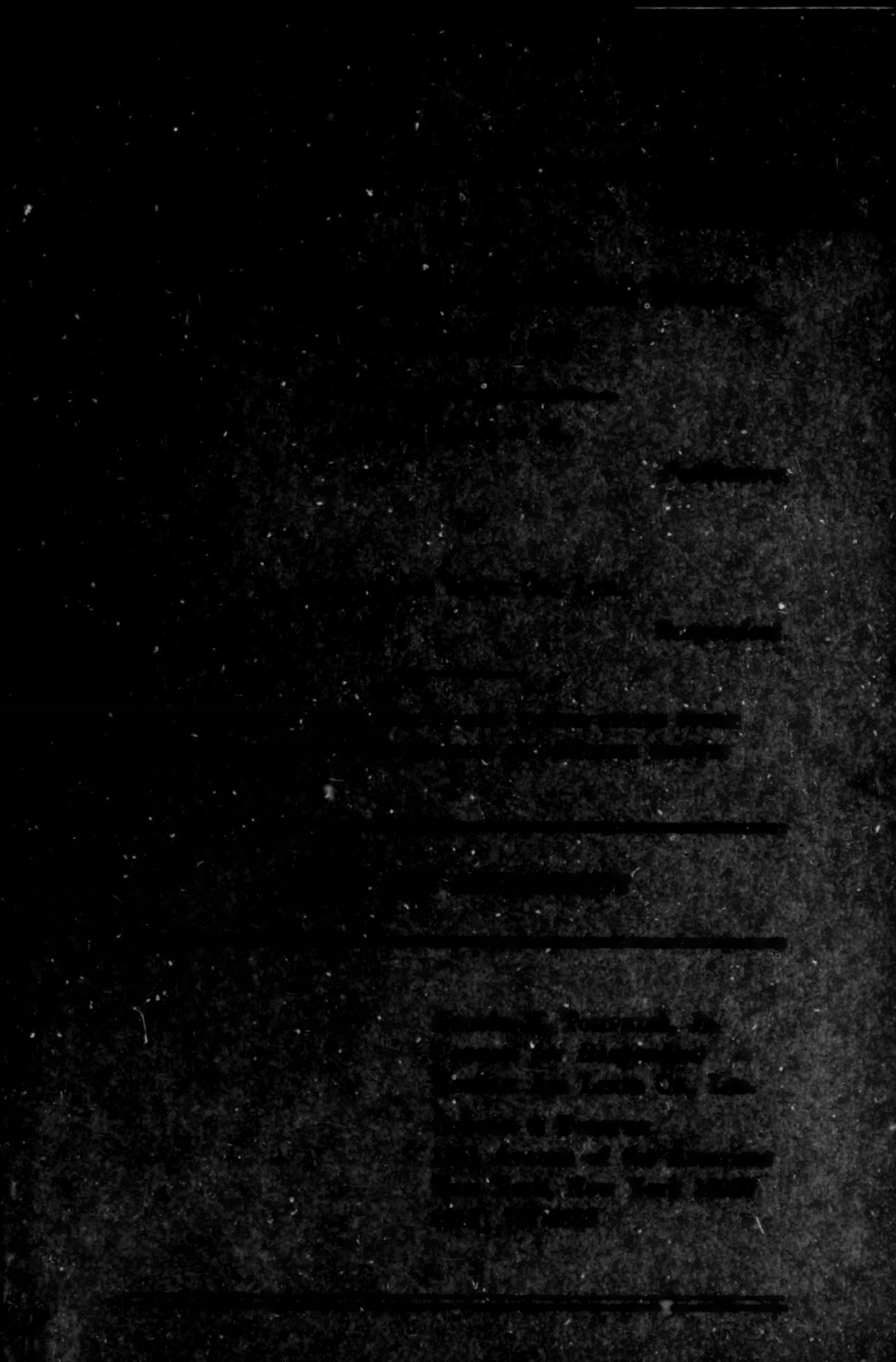


Question Presented

In actions governed by the Warsaw Convention, a treaty of the United States, does the treaty sanction of unlimited liability, set forth in Article 3(2) of the Convention, which by its own terms applies only "if a passenger is accepted without a passenger ticket having been delivered," also apply where the delivered passenger ticket contains an Advice as to the applicability of the Warsaw Convention to the transportation which is printed in 8 point type size rather than the 10 point type size specified in the inter-carrier Montreal Agreement?

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No. 87-1055

In the

Supreme Court of the United States

October Term, 1987

Elisa Chan, *et al.*,

Petitioners,

v.

Korean Air Lines Co., Ltd.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

Statement of the Case

This multidistrict litigation involves wrongful death actions arising from the premeditated murder by the Soviet Union of 269 innocent passengers and crew on board Korean Air Lines Co., Ltd. [KAL][1] Flight KE 007 on September 1, 1983. Flight KE 007, en route from New York to Seoul via Anchorage, was stalked, deliberately fired upon and destroyed over the Sea of Japan by Soviet military aircraft. All persons on board the aircraft perished.

In answering the various complaints, KAL pleaded, *inter alia,* affirmative defenses based upon the provisions of the Warsaw Convention[2] as supplemented by the Mon-

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[1] Respondent Korean Air Lines Co., Ltd., a subsidiary of which is Korean Air Terminal Service Co., Ltd., was sued incorrectly as Korean Air Lines, Ltd.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000,

(footnote continued on following page)

treal Agreement,[3] seeking to limit the liability of KAL to the sum of $75,000 per passenger.

It is undisputed that the rights of the parties are governed exclusively by the provisions of a treaty of the United States known as the Warsaw Convention. Each of petitioners' decedents was traveling on Flight KE 007 pursuant to a passenger ticket providing for international transportation by air within the meaning of the Convention. In exchange for the presumption of liability established by Article 17 of the Warsaw Convention, the carrier's liability under the Convention is excluded by requisite proof under Article 20 or is limited in accordance with Article 22. By reason of Article 3(2) of the Convention, however, the carrier is not entitled to avail itself of these provisions of the Convention which exclude or limit its liability if the carrier "accepts a passenger without a passenger ticket having been delivered." 49 Stat. 3015. (App. 3a) It is undisputed that KAL delivered passenger tickets to each of petitioners' decedents as required by Article 3(2).

The passenger tickets delivered by KAL included a point in the United States as a place of origin, destination or agreed stopping place. Accordingly, the provisions of a private agreement among air carriers known as the Montreal Agreement also applied to the transportation of petitioners' decedents. In the Montreal Agreement, participating carriers agree with respect to such transportation to increase the limit of liability under Article 22 of the Warsaw Convention to $75,000 per passenger, to waive the "all necessary measures" defense of Article 20 of the Convention and to advise each passenger of the applicability

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(footnote continued from previous page)

T.S. No. 876 (1934) *reprinted in* 49 U.S.C. § 1502 note (1976). (Relevant provisions of the Warsaw Convention are reprinted at App. 3a-8a.)

[3] Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, Agreement CAB 18900, note following 49 U.S.C. § 1502, *reprinted in* Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 515-516 (1974). (App. 9a-12a)

of the limitation of liability in an "Advice to International Passenger on Limitation of Liability [Montreal Advice] . . . printed in type at least as large as 10 point modern type". (App. 10a)

KAL timely delivered passenger tickets containing the Montreal Advice but some of the delivered tickets contained the Montreal Advice printed in 8 rather than 10 point type size. The Montreal Agreement does not provide for any sanction for the failure to print the Montreal Advice in 10 point type size.

Prior to trial and during the course of liability discovery proceedings, certain plaintiffs, petitioners herein, filed a motion for partial summary judgment dismissing KAL's limitation of liability defense and seeking to impose upon KAL absolute and unlimited liability for damages resulting from the deaths of petitioners' decedents. (J.A. 9-10) In support of their motion, petitioners argued that KAL was not entitled to avail itself of the Convention's limitation of liability because the Montreal Advice set forth in the KAL passenger tickets delivered to petitioners' decedents was printed in 8 rather than 10 point type size.

The District Court denied petitioners' motion. The Court of Appeals for the District of Columbia Circuit affirmed, refusing to impose upon KAL the treaty sanction of unlimited liability because of a printing irregularity in the Montreal Advice. *See In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987) (J.A. 376-441), *aff'g*, 664 F. Supp. 1463 (D.D.C. 1985) (J.A. 387-417) [*Korean Air Lines Disaster*] *and* 664 F. Supp. 1488 (D.D.C. 1987).[4] (J.A. 372-375) The Court of Appeals adopted the District Court's holding that the treaty sanction of unlimited liability may be imposed *only*

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[4] Although not expressly included in the question on which the Court granted certiorari, the Court of Appeals, and the District Court on remand, also addressed the question whether they were bound to follow two decisions of the United States Court of Appeals for the Second Circuit, *Lisi* v. *Alitalia–Linee Aeree Italiane*,

(footnote continued on following page)

for nondelivery of the passenger ticket and that the Montreal Agreement does not amend the Warsaw Convention to require printing of the Montreal Advice in 10 point type size as a condition precedent to limited liability under the Convention. *Korean Air Lines Disaster*, 829 F.2d at 1173. (J.A. 379) The Court of Appeals below rejected two prior decisions of the Court of Appeals for the Second Circuit as incorrect interpretations of the Warsaw Convention. *See Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968) [*Lisi*]; *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) [*LOT*].

Summary of Argument

In urging reversal of the judgment of the court below, petitioners confuse nondelivery of a passenger ticket, the prerequisite to the application of the treaty sanction of unlimited liability under Article 3(2) of the Warsaw Convention, with the 10 point type size specification of the Montreal Agreement. In seeking to impose the Article 3(2) treaty sanction for an alleged "breach" of the Mon-

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370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968) and *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983), in the eleven cases originally filed in New York federal courts and transferred to the District Court for the District of Columbia pursuant to 28 U.S.C. § 1407. The Court of Appeals, affirming the District Court, correctly held that on a matter of treaty interpretation only the Supreme Court can render decisions binding on lower federal courts. *Korean Air Lines Disaster*, 829 F.2d at 1176 (J.A. 385), *aff'g*, 664 F. Supp. at 1489. (J.A. 373-374). *See also* Marcus, *Conflicts Among Circuits and Transfers within the Federal Judicial System*, 93 Yale L.J. 677 (1984); *H.L. Green Co.* v. *MacMahon*, 312 F.2d 650 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963); *Clayton* v. *Warlick*, 232 F.2d 699 (4th Cir. 1956); *Roth* v. *Bank of the Commonwealth*, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,267 at 91,707 (W.D.N.Y. 1981); *Scheinbart* v. *Certain-Teed Products Corp.*, 367 F. Supp. 707 (S.D.N.Y. 1973).

treal Agreement, petitioners make two incorrect assumptions.

First, the Warsaw Convention does not, as petitioners argue, impose a sanction of unlimited liability for failure to deliver a ticket containing the Article 3(1)(e) "statement" that the transportation is subject to the Convention's liability rules. 49 Stat. 3015. (App. 3a)

In plain and unambiguous language, Article 3(2) of the Convention imposes the extreme treaty sanction of unlimited liability only if the carrier "accepts a passenger without a passenger ticket having been delivered." 49 Stat. 3015. (App. 3a) This treaty sanction does not apply if the Article 3(1)(e) "statement" is omitted from a delivered ticket. It is undisputed that KAL delivered passenger tickets which contained the "statement" specified in Article 3(1)(e) of the Convention.

Second, the Montreal Agreement cannot and does not amend the Warsaw Convention to impose unlimited liability for failure to deliver a ticket containing the Montreal Advice in 10 point type size. The Montreal Agreement is a private agreement among air carriers and is not an agreement among sovereign states. Under well accepted domestic and international legal principles, the Montreal Agreement cannot amend in any way a multilateral treaty such as the Warsaw Convention. In addition, the Agreement prescribes no sanction for failure to comply with any of the provisions thereof, including the type size stipulation.

Similarly, the Department of Transportation [DOT] Economic Regulations[5] providing that, as a condition to the holding of a foreign air carrier permit, the carrier shall provide the Montreal Advice in 10 point type size, do not and cannot amend the Warsaw Convention to impose unlimited liability for failure to deliver a ticket with the

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[5] *See* 14 C.F.R. §§ 203.4, 203.5, 213.7 and 221.175(a). (App. 15a-18a).

Montreal Advice in 10 point type size. *See Trans World Airlines* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Thus, KAL cannot be held subject to unlimited liability to petitioners on the basis that KAL has violated its foreign air carrier permit by failing to comply with the 10 point type size specification of a DOT Regulation.

The Court of Appeals below affirmed and adopted the District Court decision and refused to follow the *Lisi* and *LOT* decisions of the Court of Appeals for the Second Circuit,[6] because those decisions cannot be reconciled with the clear and unequivocal language and history of the Warsaw Convention and Montreal Agreement.

In *Lisi*, the Second Circuit ignored the unambiguous language of Article 3(2) and the drafting history with respect thereto, and judicially rewrote the Warsaw Convention to circumvent what the court perceived to be an unacceptable limitation of carrier liability. The court in *Lisi* improperly added to the Warsaw Convention a judicial sanction of unlimited liability unless the delivered passenger ticket gives "adequate notice" of the carrier's limited liability. In *LOT*, once again motivated by judicial distaste for the treaty's liability limitation, the Second Circuit compounded its error in *Lisi*, ignored well-accepted principles of law which permit only sovereign states to amend treaties and held that the Article 3(2) sanction of unlimited liability applies unless the Montreal Advice is printed in 10 point type size.

Judicial frustration with the Convention's liability limitation does not justify judicial revision of the treaty's plain and unambiguous terms. As the District Court correctly concluded:

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[6] Petitioners also rely on a Fifth Circuit decision, *In re Air Crash Disaster near New Orleans, Louisiana*, 789 F.2d 1092 (5th Cir. 1986), *aff'd in pertinent part*, 821 F.2d 1147 *(en banc)*, petition for cert. filed sub nom. *Pan American World Airways* v. *Lopez*, —— U.S. ——, 55 U.S.L.W. 3369 (Nov. 6, 1987), which simply adopted the Second Circuit decisions without analysis or discussion.

> Construing the phrase "accept a passenger without a passenger ticket having been delivered" to include physically delivered tickets which fail to contain "adequate notice" of the Warsaw/Montreal limitation, courts have made a way for full recovery where there was none.

Korean Air Lines Disaster, 664 F. Supp. at 1472. (J.A. 405)

The only circumstance pursuant to which a carrier is subject to unlimited liability to passengers under Article 3(2) of the Warsaw Convention—failure to deliver a passenger ticket—has never been altered by treaty amendment to which the United States adheres. The judiciary, therefore, is obliged to enforce the Convention as originally worded.

ARGUMENT

I

The Treaty Sanction of Unlimited Liability Is Imposed Only for Nondelivery of a Passenger Ticket

A. *The Rules for Interpreting a Treaty Are Well Established*

When interpreting a treaty provision such as Article 3 (2) of the Warsaw Convention, the first step is to "begin with the text of the treaty and the context in which the written words are used." *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. ——, 108 S.Ct. 2104, 2108 (1988), quoting *Air France* v. *Saks*, 470 U.S. 392, 397 (1985); *see also Maximov* v. *United States*, 373 U.S. 49, 53-54 (1963). Because a treaty is a contract among sovereign nations, its meaning must be taken "as understood in the public law of nations, and not in any artificial or special sense impressed upon [it] by local law. . ." *De Geofroy* v. *Riggs*, 133 U.S. 258, 271 (1890); *accord Pizarro*, 2 Wheat. 227, 246 (1817) (the "language of the law of na-

tions . . ." is "always to be consulted in the interpretation of treaties").

Article 3(2) of the Warsaw Convention clearly provides the only circumstance when the sanction of unlimited liability is imposed on a carrier. It would not be proper for the Court to create by judicial action another circumstance for the imposition of the sanction. The impropriety of the Court doing so is particularly compelling since the parties to the Warsaw Convention have expressed the only circumstance where the sanction should apply. Compare, for example, Article 3(2) with Articles 4(4) and 9, relating to baggage and cargo respectively, where additional circumstances for the imposition of the sanction are set forth. (App. 3a-6a)

As the Court recently reaffirmed: "Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Schlunk*, 486 U.S. at ——, 108 S.Ct. at 2108, quoting *Saks*, 470 U.S. at 396; *see also Sumitomo Shoji America* v. *Avagliano*, 457 U.S. 176, 180 (1982) (the "clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories'"); *Maximov* v. *United States*, 373 U.S. 49, 54 (1963) (petitioners must demonstrate that a literal reading of the treaty language is "inconsistent with the intent or expectations of its signatories").

The drafting history of Article 3 of the Warsaw Convention and attempts by various signatories, including the United States, to amend Article 3, confirm that the treaty sanction of unlimited liability under Article 3(2) applies only to nondelivery of the passenger ticket. Thus, the treaty language set forth in Article 3(2) must be applied because:

> In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subect-matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

Amiable Isabella, 6 Wheat. 1, 71 (1821).

B. *Article 3(2) of the Warsaw Convention Expressly States That the Treaty Sanction of Unlimited Liability Applies Only "If the Carrier Accepts a Passenger Without a Passenger Ticket Having Been Delivered"*

Article 3(2) of the Warsaw Convention establishes one[7] of the instances when an air carrier may be liable without limit in the transportation of passengers.

Article 3, as adhered to by the United States in 1934, provides:

Article 3

> (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> (a) The place and date of issue;
> (b) The place of departure and of destination;

[7] The other instance is under Article 25, pursuant to which a carrier may be held liable without limit if the passenger's injuries were the result of the carrier's "wilful misconduct". 49 Stat. 3020. (App. 8a)

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
(d) The name and address of the carrier or carriers;
(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, *if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.*

49 Stat. 3015 (emphasis added) (App. 3a); *see also* Solicitor General's Brief at App. 1a (official French version).

Article 3(2) unambiguously sets forth the *only* circumstance under which an air carrier, such as KAL, is subject to the sanction of unlimited liability with respect to the ticketing of passengers. Article 3(2) states unequivocally that the limitation of liability is unavailable to a carrier *only* "if the carrier accepts a passenger without a passenger ticket having been delivered." *See, e.g., Stratis* v. *Eastern Air Lines*, 682 F.2d 406, 411 (2d Cir. 1982); *Grey* v. *American Airlines*, 95 F. Supp. 756, 758 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *see also* Miller, *Liability in International Air Transport* at 83 (1977) ("[T]he Convention provides a sanction *only* for non-delivery of the ticket. If there is solely a failure to comply with the particulars listed in Article 3(1), there is no sanction at all.").

The highest court of Canada, a nation adhering to the Warsaw Convention, directly addressed this precise issue and held:

> [T]he words of art. 3(2) are plain and can admit of no misunderstanding. . . . The benefit of the limitation will be lost only where no ticket is delivered.

Ludecke v. *Canadian Pacific Airlines Ltd.*, 98 D.L.R.3d 52, 57 (Canada 1979). (App. 29a-40a)

Contrary to petitioners' assertion, no language in Article 3 requires that a passenger be given any "warning" of limited liability before the Warsaw Convention's liability limitations will be applicable. Petitioners' Brief at 5, 9 & 33. While Article 3(1)(e) provides for inclusion of a "statement" ("l'indication") regarding the applicability of the Warsaw Convention, there is no language in Article 3 denying to the carrier the limitation of liability if the passenger ticket omits this "statement" entirely from the ticket nor does any treaty language require this "statement" to be printed in a particular type size. All that Article 3 requires in order for the carrier to avail itself of the liability limitation is that a passenger ticket be delivered. As the District Court decision, adopted by the Court of Appeals, properly stated:

> Although Article 3(1)(e) specifies that a passenger ticket shall contain "[a] statement that the transportation is subject to the rules relating to liability established by this convention," Article 3(2) says nothing regarding the "adequacy" of notice or any other particulars of the required statement. . . . Indeed, inadequate notice through the statement could be considered an "irregularity" or defect in the passenger ticket which "shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention."

Korean Air Lines Disaster, 664 F. Supp. at 1472-73. (J.A. 406)

C. *The History of the Warsaw Convention, the Negotiations and the Practical Construction Adopted by the Parties Thereto, Confirm That the Treaty Sanction Applies Only if the Carrier Does Not Deliver a Passenger Ticket*

1. Disregarding the Unequivocal Language in Article 3(2) Would Violate the Intent and Expectations of the Convention's Drafters

When addressing a "difficult or ambiguous" passage in a treaty, the Court "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Schlunk*, 486 U.S. at ——, 108 S.Ct. at 2108, quoting *Saks*, 470 U.S. at 396; *see also Sumitomo Shoji America* v. *Avagliano*, 457 U.S. 176, 180 (1982); *Maximov* v. *United States*, 373 U.S. 49, 54 (1963).

Contrary to the assertions of the Solicitor General and petitioners, Article 3 of the Warsaw Convention is neither "difficult" nor "ambiguous." The drafting history of Article 3 confirms that the sanction of unlimited liability applies *only* to nondelivery of the passenger ticket.[8]

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[8] The treaty sanction resulting only from nondelivery of the ticket also is consistent with the state of the law in Europe in the 1920s with respect to passengers' rights vis-a-vis air carriers. *See Air France* v. *Saks*, 470 U.S. 392, 399 (1985) (The Court must look to the "expectations" of the "continental jurists" who drafted the Convention.); *Rocca* v. *Thompson*, 223 U.S. 317, 331 (1912) (The treaty is "to be read in the light of the conditions and circumstances existing at the time" at which it was drafted.). Prior to the Convention, air carriers in civil law countries were permitted unilaterally to preclude passengers from asserting any "tort" rights against air carriers, but, with respect to goods/cargo, commercial contracts were subject to negotiation. The Convention's compromise, with respect to passengers, between no liability and imposing unlimited liability, was recognized by the French delegate who noted:

> Those who did not participate in the work of the CITEJA and who read this article [22] can imagine that it creates a favorable system in favor of the carrier. They say: Why not apply the common law to him?

(footnote continued on following page)

The first International Conference on Private Aviation Law, the precursor to the Conference in Warsaw, was held in Paris in 1925. *See Air France* v. *Saks*, 470 U.S. 392, 401 (1985). At this Conference, the delegates approved a draft convention which was submitted to various governments for their review. The draft provided for a limitation on the liability of air carriers and for the utilization of passenger tickets and air waybills. The delegates also created a committee composed of aviation law experts, the Comite International Technique D'Experts Juridiques Aeriens [CITEJA], to develop a tentative agreement to be presented to a full conference. *See* Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. Air L. & Com. 27, 30-31 (1932) [Ide, *History of CITEJA*].

At the First Session of CITEJA, held in Paris in 1926, CITEJA was divided into four drafting "Commissions." Ide, *History of CITEJA* at 32-33. The responsibility for drafting provisions governing the air carrier's liability to passengers and with respect to goods/cargo were assigned to the "Second Commission." *Id.*

(footnote continued from previous page)

> Well, in reality, this Convention creates against the air carrier an exceptional system, because in the majority of the countries of the world, contracts of carriage are concluded under a system of free contract. *The carrier is free to insert in the contract clauses which exclude or reduce his liability*, as much for goods as for travelers. You are of course aware that they have lost no opportunity to do so, and presently many air carriers operate under this unregulated contractual system, and, in practice, in fact, they are not liable.
>
> One has desired to imposed upon them a compulsory system of liability. . . . [I]t was natural not to impose on them common law liability. It's in the spirit of compromise that one has said: All that can be asked from the air carrier is to take reasonable measures to avoid the damage, to have his aircraft in good flying condition, and to make such that they are well flown.

Second International Conference on Private Aeronautical Law Minutes (Warsaw, 1929) (R. Horner & D. Legrez trans. 1975) at 47-48 (emphasis added). (App. 26a-27a)

The first draft of a provision to govern the passenger ticket was considered at the Third Session of CITEJA held in Madrid, Spain from May 24-29, 1928. *See Comite Internationale Technique D'Experts Juridique Aeriens, Compte Rendu de la Troisieme Session* (May 1928) [CITEJA Minutes, Third Session]; Solicitor General's Brief at App. 59a-92a. The draft Article 3 passenger ticket provision provided.

> For the transportation of passengers, the carrier must deliver a passenger ticket which *shall contain the following particulars:*
>
> a) the place and date of issue;
> b) the place of departure and of destination;
> c) a brief indication of a route to be followed, as well as the agreed stopping places;
> d) the name and address of the carrier or carriers.
>
> The passenger ticket must also contain a *statement* that the transportation is subject to the rules relating to liability established by this Convention.
>
> The absence, irregularity, or loss of this transportation document shall not affect the existence or the validity of the contract or transportation.
>
> If, for international transportation, the carrier *accepts a passenger without a passenger ticket containing the particulars indicated above* having been made out, the contract of transportation shall still be subject to the rules of this Convention, but the carrier shall not be entitled to avail himself of those provisions of this Convention which exclude fully or partially his direct liability or that deriving from the negligence of his agents.

CITEJA Minutes, Third Session (May 24, 1928) (emphasis added); Solicitor General's Brief at App. 79a-82a; *see also* Ide, *History of CITEJA* at 34-35.

Contrary to the assertions of petitioners (Petitioners' Brief at 30-31) and the Solicitor General (Solicitor General's Brief at 17), the "CITEJA working papers" accompanying this initial version of Article 3 do *not* "evidence that the drafters intended" to impose the sanction of unlimited liability upon the carrier for the delivery of a passenger ticket without the paragraph 2 "statement." Rather, the initial draft of Article 3 imposed the sanction only for the delivery of a passenger ticket not containing the required paragraph 1 "particulars." The paragraph 2 "statement" regarding the applicability of the Convention clearly was *not* included as a paragraph 1 "particular."

At the May 26, 1928 meeting during the Third Session, the delegates, leaving the list of particulars substantially unchanged, amended the sanction provision of Article 3 to read as follows:

> If, for international transportation, the carrier accepts a passenger *without a passenger ticket having been made out, or if the ticket does not contain the above-mentioned particulars*, the contract is still subject to the rules of this Convention, but the carrier shall not be entitled to avail himself of those provisions of this convention which totally or partially exclude his direct liability or liability derived from the negligence of his agents.

CITEJA Minutes, Third Session (May 26, 1928) (emphasis added); Solicitor General's Brief at App. 91a.

The effect of this amendment was to make it clear that the sanction of unlimited liability applied if the passenger ticket does not contain the paragraph 1 particulars (the "statement" still was not one of the particulars) *or* if there is no delivery of any ticket. (Even at this early stage of the drafting of Article 3, there was absolutely no reference to imposing the treaty sanction of unlimited liability for failure to include the "statement," let alone for failure to provide the "statement" in a minimum type size.) This version of the sanction was presented to the delegates at the full Conference in Warsaw in October, 1929 as part of Article 3 as follows:

In the carriage of travelers the carrier shall be required to deliver a passenger ticket which *shall contain the following particulars:*

(a) the place and date of issue;
(b) the points of departure and of destination;
(c) summary indication of the route to be followed (via) as well as the contemplated stopping places;
(d) the name and address of the carrier or carriers.

The passenger ticket *shall contain, moreover, a clause* stipulating that the carriage is subject to the system of liability set forth by the present Convention.

The absence, irregularity, or loss of this document of carriage shall not prejudice either the existence or the validity of the contract of carriage.

If, for international carriage, the carrier accepts the traveler without having drawn up a passenger ticket, *or if the ticket does not contain the particulars indicated hereabove*, the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability or that derived from the faults of his servants.

Second International Conference on Private Aeronautical Law Minutes (Warsaw, 1929) (R. Horner & D. Legrez trans. 1975) at 258-59 [Horner, *Warsaw Minutes*][9] (emphasis added) (J.A. 182-183), *translated from II Conference Internationale de Droit Prive Aerien, 4-12 October 1929, Varsovie,* ICAO Doc. No. 7838 (1957). (J.A. 182-183)

This version of Article 3 was first considered in Warsaw on October 9, 1929, during the Sixth Session of the

[9] Mr. Horner sets forth an English translation of the Warsaw Convention and its history which differs in insignificant respects from the translation provided by the Solicitor General, *e.g.*, "transportation" for "carriage"; "above-mentioned" for "indicated hereabove".

Conference. The only proposal to amend Article 3 with respect to the sanction discussed at the Conference[10] was made by the Greek delegate. The Greek delegate objected, "as omissions without great importance," to the severity of the sanction of unlimited liability for omission of one or any of the paragraph 1 "particulars." Horner, *Warsaw Minutes* at 303-304; Solicitor General's Brief at App. 116a-118a. The drafting "commission allied to this [the Greek] point of view" and deliberately deleted from the draft the words "or if the ticket does not contain the particulars indicated above." Horner, *Warsaw Minutes* at 150 (J.A. 147); *see also* Drion, *Limitation of Liabilities in International Air Law* at 267-68 (1954).[11]

At the Conference in Warsaw, Mr. Henri De Vos, on behalf of CITEJA, presented a Report on the drafting of the Convention. The CITEJA Report contained a summary of the passenger ticket provisions, including a comment that "the sanction provided for for [*sic*] carriage of passengers without a ticket or with a ticket not conforming to the Convention is identical to that provided for, for carriage of baggage and goods." Horner, *Warsaw Minutes* at 247. (App. 28a) The Solicitor General and petitioners rely on this Report as support for precluding KAL from availing itself of the Article 22 limitation.

[10] Other proposals to amend Article 3 were: a Polish proposal that two copies of the passenger ticket be provided by the carrier; the Hungarian, British and German proposals concerning the wording of Article 3(1)(c); the German and Czechoslovakian proposals concerning the addition of a particular that would indicate the ticket price; and the Polish and Brazilian proposals concerning the addition of a particular on the ticket to indicate the name and address of the passenger. Horner, *Warsaw Minutes* at 148-150. (J.A. 145-153)

[11] The Warsaw delegates' opposition to imposing unlimited liability upon a carrier that failed to include all of the paragraph 1 "particulars" in the passenger ticket was based on the delegates' understanding that the *quid pro quo* for presumptive liability under Article 17 is the carrier's right to invoke the Convention's limitation of liability. *See* Letter from Secretary of State Cordell Hull to President Franklin D. Roosevelt (Mar. 31, 1934), *reprinted in* [1934] U.S. Av. Rep. 240; *see also Korean Air Lines Disaster,* 664 F. Supp. at 1474-1476. (J.A. 409-413)

See Solicitor General's Brief at 17; Petitioners' Brief at 30-31. The Report, however, relates to the draft of Article 3 in which the "identical" sanction—unlimited liability—applied if the passenger ticket or the baggage check does not contain the listed "particulars." The sanction for failure to include the "particulars" was deleted at the Conference with respect to the passenger ticket only. No draft of Article 3 applied the sanction to instances where the carrier omitted from the passenger ticket the "statement" regarding the applicability of the Convention's liability rules. Thus, as the Solicitor General correctly concedes, the drafting history "suggests an intention to eliminate any sanction for an air carrier's violation of Article 3's notice[12] requirement." Solicitor General's Brief at 21.

Thereafter, the full Conference, in the Seventh Session held on October 10, 1929, adopted the final version of Article 3 in which the sanction of unlimited liability expressly is limited to nondelivery of the passenger ticket. The Article 3(2) sanction provision as finally adopted reads:

> Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

49 Stat. 3015. (App. 3a)[13]

As the Solicitor General indicates (Solicitor General's Brief at 20), the Japanese delegation proposed that with

[12] Notwithstanding the Solicitor General's repeated characterization of the "statement" ("l'indication") as a "notice" ("avis"), the Solicitor General has failed to point to a single instance where the Article 3 "statement" was referred to by any delegate at the Warsaw Conference as a "notice".

[13] Just as the English translation of the Minutes of the Conference set forth in Horner, *Warsaw Minutes* differs in insignificant respects from the Solicitor General's translation (*see* discussion, *supra* at 16 n.9), the English translation of Article 3 as reported in 49 Stat. 3015 differs in insignificant respects from Article 3 as translated in Horner, *Warsaw Minutes*.

respect to Articles 3 and 4, "the clause concerning liability [should be made] compulsory" as in Article 9 (originally Article 17). Horner, *Warsaw Minutes* at 301; Solicitor General's Brief at App. 118a. From this, the Solicitor General speculates that the final version of Article 3 does not reflect the delegates' acceptance of the Japanese proposal because the delegates were confused when they amended the preliminary draft. *See* Solicitor General's Brief at 18-21. The Minutes of the Conference reflect no confusion or discussion whatsoever concerning the Japanese proposal. Rather than evidencing confusion, the drafting history of Article 3, including the Minutes of the session at which it was discussed, indicate a deliberate decision by the delegates not to make the statement "compulsory" in Article 3 in spite of the Japanese proposal.

In the face of this overwhelming evidence, petitioners and the Solicitor General nevertheless argue that the drafters intended to impose the Article 3(2) sanction if the ticket fails to include the "particular" of the Article 3(1)(e) "statement." There is absolutely no support for such argument[14] to be found in the drafting history of the Convention. The drafting history of Article 3 only supports the contrary position, *viz*, the drafters intended to and expressly did limit the application of the Article 3(2) sanction to nondelivery.

2. Examination of Article 3 in the Broader Context of Other Provisions of the Warsaw Convention Regarding Transportation Documents Confirms the Limited Application of the Article 3(2) Sanction

Comparison of the unamended Warsaw Convention provisions regarding transportation documents (passenger

[14] Petitioners' cite to Reporter De Vos' comment regarding ensuring that the ticket indicates that the carriage is "international carriage" (Petitioners' Brief at 34-35) as support for their argument that the treaty sanction under Article 3 applies if the "statement" is omitted (which it was not from the subject KAL passenger tickets). The comment merely confirms that the carriers should be strict in providing the particulars even though the incentive of treaty sanction in the absence of particulars was eliminated. This comment does not controvert the clear meaning of Article 3.

ticket, baggage check and air waybill) further emphasizes the treaty drafters' intent to apply the sanction of unlimited liability *solely* for nondelivery of the passenger ticket. A highly significant difference exists between the provisions in Article 3, which specify the contents of the passenger ticket and delineate the circumstance under which unlimited liability will be imposed, and the corresponding provisions in Articles 4, 8 and 9 as to the baggage check and the air waybill governing the transportation of baggage and cargo.

Articles 3, 4 and 8 all specify the information to be included in the applicable transportation documents. The "statement" regarding the applicability of the Convention's liability rules is identical in Articles 3, 4 and 8. *See* 49 Stat. 3015-3017. (App. 3a-6a) Articles 3(2), 4(4) and 9 all impose the sanction of unlimited liability if the applicable documents are not delivered or made out. However, *only* Articles 4(4) and 9 also apply the sanction of unlimited liability if the baggage check and air waybill fail to contain certain particulars, one of which is the "statement" that the carriage is subject to the Convention's liability rules. *Id.* A comparison of Articles 4(4) and 9 with Article 3(2) confirms "that delivery of a ticket suffices to limit the carrier's liability with respect to passengers even if the ticket does not contain the" Article 3(1)(e) statement. *Stratis* v. *Eastern Air Lines*, 682 F. 2d 406, 411 (2d Cir. 1982);[15] *see also Grey* v. *American Airlines*, 95 F. Supp. 756, 758 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

A comparison of the drafting history of Articles 4, 8 and 9, with the drafting history of the passenger ticket provisions in Article 3, confirms beyond question that Article 3, as finally adopted, reflects the clear intent of the Convention's drafters to apply the unlimited liabil-

[15] In the next paragraph of the *Stratis* opinion, however, the Second Circuit ignored this distinction and, following the erroneous *Lisi* decision, rejected "a literal reading of Article 3(2)'s requirement of mere delivery of a ticket." 682 F.2d at 411.

ity sanction *only* for nondelivery of the passenger ticket. *See Saks*, 470 U.S. at 399 (the Court must look to the "expectations" of the "continental jurists").[16] Article 4, as originally drafted and forwarded to Warsaw by CITEJA, imposed the treaty sanction only if the baggage check was missing certain particulars, none of which was the "statement." *See* Solicitor General's Brief at App. 84a-87a; Horner, *Warsaw Minutes* at 259. (J.A. 183-184) At the Conference in Warsaw, however, immediately after the discussion regarding Article 3, the "statement" on the baggage check required by Article 4 was made a compulsory "particular" the omission of which subjected the carrier to unlimited liability. *See* Horner, *Warsaw Minutes* at 155-156. (J.A. 153-154) The final version of Article 9 (even as originally drafted as Article 18) provided that the carrier would be subject to unlimited liability if the air waybill failed to contain the required "particulars" *and* the "statement." *See* Solicitor General's Brief at App. 88a-90a.

The *deliberate inclusion* in Articles 4 and 9 of the "statement" as a compulsory "particular," the omission of which subjects the carrier to unlimited liability, was directly contrary to the *deliberate deletion* of the treaty sanction in Article 3 for omission of any or all of the paragraph 1 "particulars" including the Article 3(1)(e) "statement."

The Solicitor General's speculation that this deliberate redrafting of the CITEJA draft convention was unintended (Solicitor General's Brief at 21) is belied by Mr. De Vos' Report "[o]n the subject of compulsory particulars" in Article 4. Horner, *Warsaw Minutes* at 156. (J.A. 154) Following discussion of Article 3, Mr. De Vos reported that the drafting committee "retained the same sanction" in Article 4 as drafted by CITEJA, but reduced the compulsory particulars to only: (d) the number of the pas-

[16] It was consistent with the then existing state of European law that the drafters did not impose unlimited liability if an air carrier failed to include the statement in the passenger ticket. *See* discussion, *supra* at 12-13 n.8.

senger ticket, (f) the number and weight of the packages and (h) the "statement." *Id.* Mr. de Vos specifically noted that the "last paragraph [of Article 4] *was not modified* like Article 3" to delete the treaty sanction for the omission of the listed particulars in the passenger ticket (emphasis added). *Id.*

The drafting history of Articles 3, 4 and 9 clearly refutes petitioners' argument that the parties intended the treaty sanction for omission of the Article 3(1)(e) statement to be inferred in Article 3(2), because this sanction was *included expressly* in Articles 4 and 9 and never was made applicable to Article 3.

3. The Drafting History of the 1955 Hague Protocol Confirms Conclusively that Article 3(2) of the Warsaw Convention Applies Only to Nondelivery of the Passenger Ticket

In 1955, the parties to the Warsaw Convention agreed to certain amendments to the treaty as set forth in The Hague Protocol. *See* Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955, 478 U.N.T.S. 371 [The Hague Protocol]. (J.A. 207-244) Although The Hague Protocol never has been ratified by the United States,[17] the amendments to Article 3 proposed by the United States and adopted at the Conference confirm that the Warsaw Convention limits imposition of the Article 3(2) sanction to nondelivery of the passenger ticket.

At The Hague, the delegates considered various proposals to amend the Article 3(1)(e) "statement" to provide "notice" to passengers of the carrier's limited li-

[17] *See* S. Exec. Rep. No. 3, 89th Cong., 1st Sess. (1965); S. Exec. Doc. H., 86th Cong., 1st Sess. (1959); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 504-516 (1967) [Lowenfeld, *The Warsaw Convention*].

ability under the Convention and also to provide a sanction of unlimited liability for failure to provide such "notice." *See* I & II ICAO, *International Conference on Private Air Law*, Minutes (1955), The Hague [The Hague Minutes]. (J.A. 207-230; App. 19a-25a) The United States draft proposal in particular read as follows:

> In Article 3—
>
> (a) Paragraph 1 shall be deleted and replaced by:
>
> "(1) For the carriage of passengers a ticket shall be delivered containing the following particulars:
>
> • • •
>
> (d) The statement set forth below, printed in a color which contrasts with the other printing and with the ticket stock:
>
> '*Advice to International Travellers* (in letters not less than ½ centimeter high)
>
> Travellers embarking upon a journey involving an ultimate destination or stop in a country other than the country of origin are advised that the Warsaw Convention may be applicable to their journey. The Convention governs the liability of carriers to passengers and shippers and limits liability for personal injury or death in most cases to—Poincare gold frances'."
>
> (b) Paragraph 2 shall be deleted and replaced by:
>
> "(2) The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. . . . Nevertheless if the carrier accepts the passenger without a passenger ticket having been delivered *or if the ticket does not include*

> *the statement in the form required by Paragraph (1) relating to the applicability of the Convention he shall not be entitled to avail himself of any of the defenses which exclude or limit his liability.*"

The Hague Minutes, II, ICAO at 243 (emphasis added). (App. 24a-25a)

In response to the United States proposal, the delegates at The Hague agreed to *amend* Article 3(1)(e) of the Convention to replace the "statement" with an explicit "notice" as to the carrier's limited liability. Thus, the amended Article 3 as adopted at The Hague, provides for inclusion in the passenger ticket of:

> c) *a notice* to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and . . . in most cases limits the liability of carriers for death or personal injury . . .

and, with respect to the sanction, provides:

> Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or *if the ticket does not include the notice required by paragraph 1 c) of this Article, the carrier shall not be entitled to avail himself of the* [limitation of liability] *provision of Article 22.*

The Hague Protocol, Article 3(1)(c) (emphasis added). (J.A. 253 & 255)

It is self-evident that the United States proposed the amendment because unamended Article 3(2) did not impose such a sanction.

The discussions at The Hague confirm that the delegates clearly understood that unamended Article 3(2) imposes the treaty sanction of unlimited liability *only* if the carrier fails to deliver a ticket to the passenger. For

example, in responding to the French Delegate's remarks in favor of the amendment to Article 3 drafted in Rio de Janeiro,[18] the representative of the International Union of Aviation Insurers and the International Chamber of Commerce stated that "the Convention, unlike the [Rio] Protocol, did not impose a sanction on the carrier for failure to include the statement concerning liability." The Hague Minutes, I, ICAO at 81 (App. 22a); *see also* The Hague Minutes, I, ICAO at 66. (App. 19a-21a)

The Italian Delegate noted:

> . . . According to the text of the old Convention there was a sanction only in the case where the passenger ticket had not been delivered, while, in the case of the Protocol, there were two instances in which the carrier might have unlimited liability: where he accepted a passenger without a passenger ticket having been delivered and if the ticket did not include the statement that the carriage was subject to the rules relating to liability established by the Convention. Beyond doubt, the text of the old Convention was more favourable to the carrier than the Protocol.

The Hague Minutes, I, ICAO at 84. (App. 23a)

The German Delegate specifically opposed the inclusion of a sanction for failure to include the "notice" (as redrafted by the delegates) on the passenger ticket, positing:

> Suppose a ticket agent issued an old form of ticket which did not contain the notice. Was that a reason for exposing the carrier, who had not, himself, issued the ticket, to unlimited liability?

The Hague Minutes, I, ICAO at 127. (J.A. 219)

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[18] The Legal Committee of ICAO drafted amendments to the Warsaw Convention in Rio de Janeiro in 1953. Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 505. The sanction provision of Article 3 drafted in Rio, which also was under consideration at The Hague Conference, is virtually identical to the United States proposal.

The delegates accepted the United States proposal to amend Article 3(2) to *extend* the sanction of unlimited liability to situations where the passenger ticket does not contain the newly specified "notice." Comparison of the unamended Article 3 "statement" ("l'indication") with The Hague Protocol "notice" ("avis") further demonstrates the fallacy of petitioners' argument that the unamended Article 3(1)(e) "statement" was intended to be a notice.[19] Article 3(2) as amended by The Hague Protocol—unlike the original Article 3(2) at issue herein—provides that the carrier will not be entitled to the Convention's limitation of liability if "the passenger embarks without a passenger ticket having been delivered, *or if the ticket does not include the notice required by paragraph 1(c) of this Article.*" The Hague Protocol, Article 3(2) (emphasis added) (J.A. 255)

This amendment to Article 3 compels the conclusion that the new "notice" requirement of amended Article 3(1)(c) and the sanction imposed by amended Article 3(2) for failure to provide this "notice" were not then, and are not now, part of unamended Article 3 of the Warsaw Convention. The United States would have had no reason to advocate superfluous amendments to the Warsaw Conven-

[19] Adoption of these amendments confirms that the "statement" in the original, unamended Article 3(1)(e) is not the equivalent of the "notice" or warning contained in amended Article 3(1)(e). *See Montreal Trust Co.* v. *Canadian Pacific Airlines Ltd.*, 72 D.L.R. 3d 257, 263 (Canada 1976) (notice required by The Hague Protocol and the statement required by the Convention "are . . . two completely different requirements with radically different effects"). (App. 41a-51a) The statement never was intended as a notice requirement, but rather as a "clause paramount" in keeping with other transportation conventions adopted prior to the Warsaw Convention. Such a statement, or "clause paramount", is intended to function as a choice of law provision, ensuring that the Convention will be applied by a state not a party thereto. *See* Drion, *Limitation of Liabilities* at 305-306; *Hurry On* (*Vita Food Products* v. *Unus Shipping Co.*), [1939] A.M.C. 257, [1939] A.C. 277 (Eng. P.C.). A similar provision exists in the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1312. *See* Gilmore & Black, *Law of Admiralty* 145, 185 (2d ed. 1975).

tion if the substance of the proposed amendments already existed in the original terms of the unamended Convention. Thus, at The Hague Conference, the United States and other participating governments correctly understood unamended Article 3 to have a meaning diametrically opposed to the interpretation presently urged by petitioners and the Solicitor General.

As explained by Professor H. Drion, The Netherland's Delegate to the 1955 Hague Conference, with respect to the clear understanding of the parties to the unamended Convention:

> Both the wording of Article 3(2), when compared with that of Articles 4(4) and 9, and the history of the provision make it abundantly clear that the framers of the Convention meant to impose the sanction with respect to the ticket *only* in case of a complete failure to deliver a ticket, and did *not* want to attach the sanction to the omission of the prescribed particulars.

Drion, *Limitation of Liabilities* at 300 (emphasis added); *see also* Goedhuis, *National Airlegislations and the Warsaw Convention* at 156-157 (1937) (prior to becoming President of The Hague Conference, Mr. Goedhuis explained that in cases involving delivery of the passenger ticket, unlike delivery of the baggage check, the carrier is not deprived of limited liability under unamended Article 3(2) if the delivered ticket omits the particulars specified in Article 3(1)).

In summary, the plain language of Article 3, the context in which Article 3(2) appears in the unamended Warsaw Convention, the intent of its drafters as evidenced by the drafting history of the Convention, and the understanding of the signatories as evidenced by The Hague Protocol amendments, all compel the conclusion that the sanction of unlimited liability can be imposed under unamended Article 3 *only* for failure to deliver a passenger ticket. The imposition of the treaty sanction for failure of a delivered ticket to contain the Article 3(1)(e) statement in any type

size would be contrary to the wording of the treaty, the intent of its drafters and the understanding of the signatories, including the United States. The KAL tickets were delivered and the tickets contained the Article 3(1)(e) statement. The Court below correctly held that the Article 3(2) sanction of unlimited liability did not apply.

D. *A Judicially Desired "Adequate Notice" Requirement Cannot Be the Basis for the Imposition of Unlimited Liability*

In the face of this overwhelming evidence, petitioners nevertheless argue that the Article 3(2) sanction should be stretched to encompass a situation where a delivered passenger ticket includes the Montreal Advice in 8 rather than 10 point type size. Petitioners, in support of their argument, rely upon two abberant decisions of the United States Court of Appeals for the Second Circuit. *See Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968) [*Lisi*][20] and *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) [*LOT*].

In *Lisi*, the Second Circuit disregarded the unequivocal language of Article 3(2) and the intent of its drafters and held that the treaty sanction of unlimited liability should be imposed if the delivered passenger ticket fails to give "adequate notice" of the applicability of the Convention's liability limitations. The *Lisi* court held that a delivered passenger ticket can be deemed to have been "constructively nondelivered" if it does not contain this judicially desired "adequate notice." *Lisi*, 370 F.2d at 511.[21] Thus,

[20] The affirmance of *Lisi* by an equally divided Court is of no precedential value because the Court does not pass on an issue upon which it is equally divided. The judgment of the lower court simply remains in effect. *See Hertz* v. *Woodman*, 218 U.S. 205, 213-214 (1910); *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107 (1868).

[21] In *Lisi*, the Court found that adequate notice had not been given because the Article 3(1)(e) statement as to the Conven-

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the *Lisi* court grafted upon the unambiguous Article 3 treaty language a judicially created requirement of "adequate notice" and a concept of "constructive non-delivery of the passenger ticket" to circumvent what the *Lisi* court perceived to be the Warsaw Convention's unacceptable limitation of the carrier's liability.[22] As was so aptly stated by Circuit Judge Moore in his dissenting opinion in *Lisi:* "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it." *Lisi*, 370 F.2d at 515 (Moore, J., dissenting).

The Second Circuit in *LOT*, again motivated by judicial distaste for the treaty's liability limitation, relied on the

(footnote continued from previous page)

tion's applicability, which was printed in 4 point type, was "camouflaged in Lilliputian print." *Lisi*, 370 F.2d at 515. After *Lisi*, 8 point type size has been held to constitute adequate notice under *Lisi*. *See, e.g., Millikin Trust Co.* v. *Iberia, Lineas Aereas de Espana*, 11 Av. Cas. (CCH) 17,331, 17,332 (N.Y. Sup. Ct. 1969), *aff'd mem.*, 36 A.D.2d 582 (N.Y.A.D. 1971).

[22] The *Lisi* decision was the last in a trilogy of cases in which increasing importance was placed upon the passenger's knowledge of the Convention's liability limitations. In *Mertens* v. *Flying Tiger Line*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965), the Second Circuit found that physical delivery of a ticket after the passenger had boarded the aircraft constituted nondelivery under Article 3(2). In *Warren* v. *Flying Tiger Line*, 352 F.2d 494, 498 (9th Cir. 1965), the Ninth Circuit agreed with *Mertens* and held that "delivery of the passenger ticket [must] be made sufficiently in advance of the flight so that the passenger may, if he desires, obtain additional insurance protection." Finally, in *Lisi*, the Second Circuit held that Article 3 required delivery of a ticket containing a noticeable and readable warning of the applicability of the Convention's liability rules; otherwise the purpose for requiring timely delivery, enunciated in *Mertens* and *Warren*, would be defeated. *Lisi*, 370 F.2d at 513. As the District Court below correctly held, however, "[w]hile it is not surprising that an American court would find it necessary that notice, once required, be given 'in such a manner as to afford [the passenger] a reasonable opportunity to take self-protective measures,' a notice requirement is nowhere within the treaty nor is the Article 3(1)(e) statement linked with the limitation." *Korean Air Lines Disaster*, 664 F. Supp. at 1473. (J.A. 406-407)

Lisi court's "adequate notice" characterization of Article 3 and held that the Montreal Agreement type size specification for the Montreal Advice somehow served to amend Article 3(2). *LOT*, 705 F.2d at 89. Thus, the Second Circuit in *LOT* compounded its error in *Lisi* by holding that the Warsaw Convention's sanction of unlimited liability applies if the carrier delivers a passenger ticket which contains the Montreal Advice printed in anything less than 10 point type size.

The erroneous conclusion in *Lisi* clearly was based upon the *Lisi* court's distaste for the Convention's liability limitation, which was perceived as a "one-sided advantage" enjoyed by the carrier. *Lisi*, 370 F.2d at 513.[23] Ignoring the presumption of air carrier liability prescribed by Article 17, characterizing the liability limitation as "arbitrary" and emphasizing that the treaty limitation has been criticized, the *Lisi* court held, *without citation to any authority whatsoever*, that the "*quid pro quo*" for this "one-sided advantage" is delivery to the passenger of a ticket which gives adequate notice "that recovery is limited very substantially." *Lisi*, 370 F.2d at 513.

The alleged *quid pro quo* upon which the *Lisi* decision is based is incorrect. From the time that the United States adhered to the Convention, it consistently has been recognized that the *quid pro quo* for the Article 22 limitation is the Article 17 presumption of carrier liability. *See* Letter from Secretary of State Cordell Hull to President Franklin D. Roosevelt (Mar. 31, 1934), *reprinted in* [1934] U.S. Av. Rep. 240; *see also LOT*, 705 F.2d at 87; *MacDonald* v. *Air Canada*, 439 F.2d 1402, 1405 (1st Cir. 1971); *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

[23] The Second Circuit, however, has not exhibited the same judicial distaste for the Convention's liability limitation with respect to baggage and cargo. *See Republic National Bank of New York* v. *Eastern Airlines*, 815 F.2d 232 (2d Cir. 1987); *Exim Industries* v. *Pan American World Airways*, 754 F.2d 106 (2d Cir. 1985).

As the District Court correctly explained:

> [I]t has generally been agreed that the *quid pro quo* for the limitation is, not notice, but [a rebuttable presumption of] liability without fault. . . . There is no evidence that the treaty drafters and signatories intended "adequate notice" to affect the operation of the treaty limitation.

Korean Air Lines Disaster, 664 F. Supp. at 1474. (J.A. 409)

Relying on this erroneous *quid pro quo*, the Second Circuit in *Lisi* indulged "in judicial treaty making" and rewrote the plain terms of the treaty. *Lisi*, 370 F.2d at 515 (Moore, J. dissenting). In so doing, the *Lisi* court failed to adhere to the rule of treaty construction "to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. at 399.

The "adequate notice" and "constructive nondelivery" principles, which the *Lisi* court incorrectly added to the explicit Article 3(2) treaty sanction, derive from common law rules regarding contractual limitations of liability. The *Lisi* decision injects into an international treaty American common law rules, which make it "essential that notice [of limitation of liability] be adequately given before or at the time of the making of the contract." Miller, *Liability in International Air Transport* at 85.[24] As the District Court noted, because the limitation was viewed by the Second Circuit as "an alarming prospect for any

[24] Incorporation of common law contractual "adequate notice" principles, however laudable, has no place in the proper interpretation of a multilateral treaty such as the Warsaw Convention. Where the passenger ticket provides for transportation between certain designated termini, the provisions of the Convention have automatic and full impact on the rights of the parties. *See, e.g., Benjamins* v. *British European Airways*, 572 F.2d 913, 914 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). Accordingly, in interpreting the Warsaw Convention, "purely contractual rules, *e.g.* the requirement that a limitation clause be accepted by both parties, are not relevant." Miller, *Liability in International Air Transport* at 88.

passenger to face, it is not surprising [that the Second Circuit then decided] that the standard for permitting the limitation to stand and for protecting the passenger against the limitation became strict notice of the limitation." *Korean Air Lines Disaster*, 664 F. Supp. at 1473. (J.A. 407) By requiring "adequate notice" where the treaty does not, the Second Circuit simply but erroneously "managed to sidestep the limitation" and provide unlimited recovery from the carrier without proof of fault. *Korean Air Lines Disaster*, 664 F. Supp. at 1473. (J.A. 407)

By incorrectly incorporating American common law principles into the Convention, the *Lisi* court not only violated the duty of the judiciary to enforce the clear and unambiguous terms of the treaty as written, but also destroyed the international uniformity of decision which the Warsaw Convention was designed to achieve. Outside the United States, only failure to deliver a passenger ticket will give rise to imposition of the unamended Article 3(2) treaty sanction of unlimited liability. *See Ludecke* v. *Canadian Pacific Airlines*, 98 D.L.R.3d 52 (Canada 1979) (App. 29a-40a); Miller, *Liability in International Air Transport* at 88 (discussing a French court's "forceful rejection" of *Lisi* in *Canale* v. *Air France*, (France 1972) 35 R.G.A.E. 186 (Trib. gr. inst. Ajaccio, 25 Nov. 1971).[25]

The *Lisi* interpretation of Article 3(2) was soundly rejected by the Supreme Court of Canada, the highest court of one of the signatories to the Warsaw Convention. *Ludecke*, 98 D.L.R.3d at 57-58. (App. 36a-37a) In *Ludecke*, the Supreme Court of Canada refused to follow *Lisi* and, abiding by the plain language of the treaty and the intent of its drafters, held:

[25] In addition, seven signatories to the Convention officially advised the United States that the decision in *Lisi* was *contrary* to their agreement with the United States as expressed in the Convention. *See Alitalia-Linee Aeree Italiane* v. *Lisi*, No. 67-70 (1968) (Reply Brief of Petitioner to the Memorandum for the United States as *Amicus Curiae* at 2). (J.A. 290-291) *See Saks*, 470 U.S. at 404 (in interpreting the provisions of the Warsaw Convention, "the opinions of our sister signatories [are] entitled to considerable weight").

> The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred to above [including *Lisi*] which hold that delivery of a ticket with an irregularity, that is, a statement as required by art. 1[sic](e) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give the effect to a precise statement of the law. I am unable, however harsh and unreasonable I may consider the limitation, to adopt the American test. It is clear in this case that the carrier delivered a ticket and thus preserved its right to the limitation.

Ludecke, 98 D.L.R.3d at 57-58. (App. 37a).

The Court of Appeals below correctly refused to perpetuate further the judicial treaty rewriting indulged in by the Second Circuit in *Lisi* and extended by *LOT*. The decision in *Lisi* was wrong when rendered and it is wrong today. The Court should affirm the decision of the Court of Appeals below and reject the *Lisi* and *LOT* decisions as incorrect.

II

Delivery of a Passenger Ticket With the Montreal Advice in 8 Point Type Size Is Not a Basis for Imposing the Treaty Sanction of Unlimited Liability

A. *The Montreal Agreement Cannot and Does Not Amend the Warsaw Convention to Extend the Article 3(2) Sanction to Cases Where the Delivered Passenger Ticket Contains the Montreal Advice in 8 Point Type Size*

The Warsaw Convention is a treaty of the United States and as such is the supreme law of the land. U.S. Const. art. VI, cl. 2. *See also United States* v. *Pink*, 315 U.S. 203 (1942); *Bacardi Corp. of America* v. *Domenech*, 311 U.S. 150 (1940); *United States* v. *Belmont*, 301 U.S. 324 (1937). On the national level, a treaty of the United States may be abrogated only by a subsequent and superceding treaty or by an Act of Congress. *See Trans World Airlines* v.

Franklin Mint Corp., 466 U.S. 243, 252 (1984); *Cook* v. *United States*, 288 U.S. 102, 120 (1933). On the international level, a multilateral treaty such as the Warsaw Convention may be amended only by agreement between the sovereign states that are parties to the treaty. *See* Article 39, Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *reprinted in* 63 Am. J. Int'l L. 875, 887 (1969) (entered into force Jan. 27, 1980) [Vienna Convention].[26]

The Montreal Agreement is not an agreement among sovereign states but is merely a private agreement among air carriers filed with the DOT pursuant to DOT Economic Regulation Parts 203 and 213 (14 C.F.R. §§ 203 & 213). *See Air France* v. *Saks*, 470 U.S. 392, 406 (1985). Thus, the Court's "duty to enforce" the terms of the Warsaw Convention "cannot be circumvented by reference to the Montreal Agreement of 1966." *Saks*, 470 U.S. at 406; *see also Cook* v. *United States*, 288 U.S. 102 (1933); *Johnson* v. *Browne*, 205 U.S. 309 (1907); *Reed* v. *Wiser*, 555 F.2d 1079, 1093 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

In *Air France* v. *Saks*, 470 U.S. 392, 395 (1985), the question before the Court was "whether a loss of hearing proximately caused by normal operation of the aircraft's pressurization system is an 'accident' within the meaning of Article 17 of the Warsaw Convention." Respondent Saks

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[26] Although the United States is not a party to the Vienna Convention, the Vienna Convention has been recognized by the Court as an authoritative statement of international law. *See Weinberger* v. *Rossi*, 456 U.S. 25, 29 n.5 (1982); [1974] *Digest of United States Practice in International Law* 198 (1975) ("The Vienna Convention . . . is generally regarded as reflecting current international law on the subject . . ."); *see also Paquete Habana*, 175 U.S. 677 (1900) (International law is to be applied by the federal courts in appropriate cases.).

Because a treaty is an agreement "concluded between states," it may be amended only by the nation state participants. Vienna Convention, Article 2(1)(a) & (g) *reprinted in* 63 Am. J. Int'l L. at 876; *see also Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) (a treaty is essentially a contract between or among sovereign nations).

attempted to persuade the Court that Air France should be held absolutely liable based upon the Montreal Agreement waiver of the "all necessary measures" defense under Article 20(1) of the Convention. 49 Stat. 3019. (App. 6a) The Court, recognizing that the "inquiries" with respect to the "accident" requirement under Article 17 "may on occasion be similar" to the "inquiries" with respect to the available defenses under Article 20(1), nevertheless "decline[d] to employ that similarity to repeal a treaty provision [Article 17] that the Montreal Agreement *on its face left unaltered.*" *Saks*, 470 U.S. at 407 (emphasis added). Similarly, in this case the Court should decline to amend, extend or repeal Article 3(2) of the Warsaw Convention which the Montreal Agreement "on its face left unaltered."

The Montreal Agreement reads as follows:

AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> The Carrier shall avail itself of the limitation of liability provided in the [Warsaw] Convention . . . However, in accordance with Article 22(1) of said Convention . . . the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention . . .
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs. . . .
>
> (2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail it-

self of any defense under Article 20(1) of said Convention. . . ."

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention . . . the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket . . .:

"ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

* * *

Montreal Agreement. (App. 9a-10a)

Under the Montreal Agreement, therefore, with respect to any "international transportation" (as defined in Article 1(2) of the Warsaw Convention) that includes a point in the United States, the participating carriers agreed:

1. to insert in their tariffs a provision agreeing to a limit of liability of $75,000 per passenger, a "special contract" under Article 22(1) of the Convention;[27]

2. to waive the "all necessary measures" defense available under Article 20(1) of the Warsaw Convention (*Saks*, 470 U.S. at 407); and

3. to furnish an "Advice to International Passenger on Limitation of Liability," to be "printed in type at least as large as 10 point modern type" on the ticket, or on a paper placed in the ticket envelope or on the ticket envelope.[28]

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[27] Article 22(1) provides that "by special contract, the carrier and the passenger may agree to a higher limit of liability." 49 Stat. 3019. (App. 7a) "Since the agreement is expressly stated to be a special contract under Article 22(1) of the Warsaw Convention, it incorporates all the other provisions of the Convention." Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 597.

[28] There is no requirement that paragraph 2 of the Montreal Agreement, which contains the Montreal type size requirement, be

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As petitioners acknowledge, the Montreal Agreement makes no provision for any sanction for a failure to comply with any of its provisions, including the type size specification of the Montreal Advice. *See In re Korean Air Lines Disaster of September 1, 1983*, MDL No. 565 (Transcript of Hearing at 11, D.D.C. Feb. 28, 1985). (J.A. 333) The District Court recognized that, "[a]bsolutely nothing is said [in the Agreement] to indicate that waiver of the limitation was contemplated." *Korean Air Lines Disaster*, 664 F. Supp. at 1466. (J.A. 392)[29]

In addition to the absence of any language in the Montreal Agreement waiving the limitation for noncompliance with the type size specification, the history of the Montreal Agreement is devoid of evidence that any significance was attached to the 10 point type size specification or that failure to comply with the specification was intended to result in unlimited liability.[30]

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incorporated into an airline's tariffs. Consequently, the type size provision does not constitute any part of the passenger/carrier contract. Additionally, DOT Economic Regulation Part 203.4(c) specifically provides that participation in the Montreal Agreement constitutes a "special agreement between the carrier and its passengers" only with respect to the increase in liability to $75,000 under Article 22(1) and waiver of the all necessary measures defense under Article 20(1), but not with respect to the 10 point type size requirement. *See* 14 C.F.R. § 203.4(b) & (c). (App. 15a) For these reasons, petitioners' argument that KAL is "contractually bound" to provide the passengers with "the Article 3 warning in large print" is simply incorrect. *See* Petitioner's Brief at 18.

[29] Prior to publication at 664 F. Supp. 1463, 1466, the District Court's slip opinion was slightly different than the opinion as published and read: "Contrary to the view that waiver of the limitation [of liability] was contemplated, the Montreal Agreement was entered into to *preserve* the limitation." (emphasis in original) (J.A. 392)

[30] The Montreal Agreement does not define or specify what is meant by "10 point modern type" and no specific type face (as distinguished from type size measured by lines per inch) is described by that phrase. The type face used for the Montreal Advice in the KAL passenger tickets delivered to petitioners'

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To support their argument that a carrier should be subject to the Article 3(2) treaty sanction of unlimited liability for failure to comply with one of the provisions of the Montreal Agreement, petitioners rely, as did the Second Circuit in *LOT*, upon a fictional "historical and functional relationship" between the Montreal Agreement and the Warsaw Convention. *See* Petitioners' Brief at 15-23; *LOT*, 705 F.2d at 90. Petitioners base this fictional "historical and functional relationship" argument, as did the Second Circuit in *LOT*, upon the erroneous conclusion that adequacy of notice was one of the concerns that led to the filing of the Notice of Denunciation of the Warsaw Convention by the United States in November of 1965. *See* Petitioners' Brief at 24; *LOT*, 705 F.2d at 89-90.

The Montreal Agreement arose out of the unsuccessful attempts[31] by the United States to obtain the consent of the adhering nations to amend the Warsaw Convention to increase the Article 22 limit of liability to a minimum of $100,000 per passenger. The United States ultimately recognized that it would not be able to achieve by treaty amendment what it considered to be a meaningful increase in the limitation of liability and filed a Notice of Denunciation of the Warsaw Convention with the Polish People's Republic on November 15, 1965, to be effective six months hence. *See Franklin Mint Corp.*, 466 U.S. at 282 n.22 (1984) *(citing* Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 546-552). The Notice of Denunciation, in pertinent part, stated:

> The United States of America wishes to state that it gives this notification *solely because of the low limits of liability for death or personal injury provided in the Warsaw Convention,* even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955.
>
> . . . . [T]he United States of America stands ready to participate in the negotiation of a revision of the Warsaw Convention which would provide substantially higher limits, or of a convention covering the other matters contained in the Warsaw Convention and Hague Protocol but without limits of liability for personal injury or death.

U.S. DEP'T OF STATE, PRESS RELEASE No. 268 at 2, 50 Dep't State Bull. 923 (1965) (emphasis added). (J.A. 280)

In response to this Notice of Denunciation, delegates from 59 nations and representatives of the major international air carriers convened in Montreal.[32] Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 563-575, 586-602. The only topics discussed in detail at the Montreal Conference were the level to which the limit of liability should be raised and whether absolute liability to passengers should be imposed. *Id.*

Significantly, and contrary to petitioners' assertion, the record of the proceedings in Montreal is devoid of any evidence that the United States connected the imposition of absolute but limited liability with any form of notice of the limitation. In fact, in an attachment to a United States Government Memorandum, the FAA, in preparation for the Montreal Conference, concluded that if the United States were able to obtain the consent of the participating nations to increase the limit of liability *and* to the imposition of absolute liability upon the carriers, the

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decedents, while 8 point in type size, actually is larger and more readable than many of the specimen 10 point type faces recognized by the United States Government Printing Office. *See* Specimens of Type Faces, United States Government Printing Office (Wash. 1969). (J.A. 131-135)

[31] *See* Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 532-552.

[32] The United States' leading international air carriers previously had convened at the request of the State Department to discuss ratification of The Hague Protocol by the Senate. At the meeting, the carriers were advised that unless they volunteered to raise the Warsaw limit to $100,000 per passenger, the State Department would proceed with denunciation of the Convention. *See* Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 547.

position of the passenger vis-a-vis the carrier would be "roughly balanced." United States Government Memorandum, FAA Proposal at 3 (Jan. 10, 1966). (App. 56a)

Although the Montreal Conference ended in failure, the United States did obtain agreement of participating carriers to increase the limit of liability to $75,000 per passenger "on a journey to, from, or with an agreed stopping place in the United States." Montreal Agreement. (App. 10a) As a result, on May 14, 1966, the United States withdrew its Notice of Denunciation of the Convention. U.S. DEP'T OF STATE, PRESS RELEASE No. 111, 54 Dep't State Bull. 955 (1966). (J.A. 283-284)

Contrary to the Solicitor General's repeated assertion that the United States withdrew the Notice of Denunciation as a result of the carriers' agreement to provide in 10 point type size a notice of the limitation of liability (Solicitor General's Brief at 11, 26), the Notice of Denunciation was withdrawn *solely* because the carriers had agreed to increase the limitation of liability to $75,000. The official withdrawal of the Notice of Denunciation in fact reads:

> At the time the notice under Article 39 was submitted, the United States Government stated that *that action was taken solely because of dissatisfaction with the low limits of liability* for death or personal injury provided in the Convention, even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955. Since that time, intensive negotiations among carriers and among governments have succeeded in establishing a new interim arrangement in accordance with Article 22(1) of the Convention. . . . —
>
> In view of the acceptance of this arrangement by the great majority of the world's international airlines, including all principal carriers serving the United States, the conditions which led the United States to serve its notice of November 15 have substantially changed. Accordingly, the United States of America believes that its continuing objectives of uniformity of international law and adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention. . . .

U.S. DEP'T OF STATE, PRESS RELEASE No. 111, 54 Dep't State Bull. 955 (1966) (J.A. 283-284); *see also* PRESS RELEASE No. 110. (J.A. 281)

Clearly, the *sole* reason for denouncing the Convention was the United States' dissatisfaction with the low limit of liability. When the CAB approved the Montreal Agreement as the "basis upon which the United States could withdraw its notice of denunciation," the CAB reiterated that the Notice of Denunciation was given "*solely* because of the Convention's low limits of liability for personal injury or death to passengers." 31 Fed. Reg. 7302 (1966) (emphasis added). (J.A. 285) At no time did the United States ever state that "notice" of the limitation of liability was either a reason for denunciation or the withdrawal thereof.

While dissatisfaction of the United States with the limitation of liability was the *raison d'etre* for the Montreal Agreement,[33] the Agreement significantly is devoid of even the slightest indication that the drafters of this private intercarrier agreement considered that they effectively were amending Article 3(2) of the Warsaw Convention. As the District Court correctly noted during oral argument of petitioners' motion, the drafters of the Montreal Agreement certainly would not have neglected to specify "with great precision" any provision which affected the agreed higher limit of liability, especially its alleged un-

[33] The United States' continuing dissatisfaction with the "inadequate" limitation of even $75,000 per passenger under the Montreal Agreement is reflected in a June 24, 1988 letter from the Secretary of the Department of Transportation to the Honorable George Bush, President of the Senate in which the Secretary urges the Senate to "renew active consideration of Montreal Protocols 3 and 4" combined with a supplemental compensation plan providing for "*unlimited* recovery per passenger for economic damages, subject only to a per incident, per aircraft, limitation of $500 million." Letter from Secretary of Transportation to President of the Senate (June 24, 1988) (emphasis added). (App. 57a-61a)

availability in the event that the carrier failed to print the Montreal Advice in 10 point type size. *In re Korean Air Lines Disaster of September 1, 1983*, MDL No. 565 (Transcript of Hearing at 24, D.D.C. Feb. 28, 1985). (J.A. 341)[34]

As the District Court concluded:

> While it is indeed correct that the Montreal Agreement must be read in connection with the Warsaw Convention, the resulting Warsaw/Montreal system does not include delimiting liability for failure to provide the statement in 10-point type size. In short, the Montreal Agreement may not be read wholesale into the Warsaw Convention.

Korean Air Lines Disaster, 664 F. Supp. at 1476. (J.A. 413)

B. *DOT Economic Regulation Part 221 Cannot and Does Not Amend the Warsaw Convention to Extend the Article 3(2) Sanction to Cases Where the Delivered Passenger Ticket Does Not Contain the "Advice" in 10 Point Type Size*

Petitioners attempt to support their argument that the Montreal Agreement somehow amends the Warsaw Convention by reliance upon DOT (formerly CAB) Economic Regulation Part 221 (14 C.F.R. § 221.175(a)) which petitioners argue represents "an Executive Branch determination of minimum notice to the passenger." *See* Petitioners' Brief at 19. Even if the Montreal Agreement and the predecessor CAB Regulation could be read to amend the Convention, which they cannot *(see* discussion, *supra* at 33-34),

[34] Moreover, the only mention of type size in the history of the Montreal Agreement is a passing comment that "[o]n May 4 details of the arrangement (including a notice to each passenger in large type) were worked out in an all day negotiating and drafting session in Montreal." Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 594. The "large type" referred to is the 10 point modern type size specification ultimately adopted in the Montreal Agreement and previously used by the CAB in a regulation that the CAB proposed and promulgated approximately three years earlier. *See* 14 C.F.R. § 221.175(a) (App. 17a-18a)

there is absolutely no connection between the Regulation and the Article 3(2) sanction of the Warsaw Convention. Nor is there any indication in the Regulation or its history of an intent on the part of the United States to alter, amend or affect the scope of the treaty requirements of Article 3.

In 1963, the CAB issued a notice of proposal rule-making pursuant to its regulatory powers under Sections 204 (a), 401(e) and 403 (tariff filing provisions) and 411 (unfair competitive practices) of the Federal Aviation Act. *See* 49 U.S.C. §§ 1324(a) 1371(e), 1373 & 1381; *see also* 28 Fed. Reg. 3281-3283, 11775-11777 (1963). Specifically, the CAB created a new section to Part 221 of its Economic Regulations, effective February 1, 1964, entitled: "Special notice of limited liability for death or injury under the Warsaw Convention" which reads:

> (a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish . . . the following statement in writing:
>
> ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY
>
> • • •
>
> . . . The statement prescribed herein shall be printed in type at least as large as 10-point modern type and in ink contrasting with the stock . . .
>
> • • •

14 C.F.R. § 221.175(a) (App. 17a-18a); 28 Fed. Reg. at 11777 (1963).[35]

[35] The Regulation also added a new paragraph to Part 221.38 which in pertinent part provided that "[u]nless the carrier elects to assume unlimited liability, its tariffs shall contain a statement as to the applicability and effect of the Warsaw Convention, including the amount of the liability limit in dollars. Where ap-

(footnote continued on following page)

In adopting this Regulation, the CAB made it clear that it was acting, not on the basis of the requirements of the Warsaw Convention, but rather in accordance with the CAB's statutory duty to regulate air transportation in the public interest pursuant to Section 102 of the Federal Aviation Act of 1958. *See* 49 U.S.C. § 1302. As the CAB stated when it proposed this Regulation, "the Board is of the view that the public interest requires an improved notice of the applicability and effect of the Convention and especially the amount of the carrier's limit of liability." *See* 28 Fed. Reg. 11775 (1963).

Nowhere in proposing or adopting Economic Regulation Part 221.175(a) did the CAB equate noncompliance with the Regulation to the Article 3(2) treaty sanction for failure to deliver a ticket. *See* 28 Fed. Reg. 11775-11777 (1963). To the contrary, the CAB clearly contemplated only a public law sanction under its enforcement powers for failure to comply with the Regulation. *Id.* at 11775 ("[I]mposition of the requirement by regulation . . . is required in the public interest . . . *to facilitate enforcement by the Board.*") (emphasis added).

Accordingly, while a carrier failing to comply with the Regulation may be subject to a civil penalty pursuant to 49 U.S.C. § 1471 or to a DOT enforcement action pursuant to 49 U.S.C. app. § 1487(a), there is no provision any law or regulation which authorizes imposition of the Article 3(2) treaty sanction for failure to comply with the type size specification of Economic Regulation Part 221.175(a). As the CAB advised the Court in the *Lisi* case, when promulgating this Regulation "the Board was *not* endeavoring

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(footnote continued from previous page)

plicable, a statement advising passengers of the amount of any higher limit of liability assumed by the carrier shall be added." 14 C.F.R. § 221.38(j) (App. 17a); 28 Fed. Reg. at 11777 (1963).

DOT Economic Regulation Part 221.38(j) as presently in force is identical to CAB Economic Regulation Part 221.38(j) as originally issued. Similarly, DOT Economic Regulation Part 221.175(a) as currently in force is identical, as pertinent herein, to CAB Economic Regulation 221.175(a) as originally issued.

to determine the requirements of the Warsaw Convention." *Alitalia-Linee Aeree Italiane* v. *Lisi,* No. 67-70 (1968) (Memorandum for the Civil Aeronautics Board as *Amicus Curiae* at 9) (emphasis added). (J.A. 297)[36]

Neither the Montreal Agreement nor Economic Regulation Part 221 amended or otherwise affected Article 3(2) of the Convention. No relationship exists, historical or otherwise, between the Article 3(2) treaty sanction and the Montreal Agreement type size specification (or its predecessor CAB Regulation) and no language in the Montreal Agreement authorizes the imposition of any sanction for failure to comply with its terms. Only Article 3(2) of the Convention provides the basis for the imposition of any sanction upon KAL and the sole requirement of Article 3(2)—delivery of the passenger ticket—has been met in this case.

C. *A Sanction of Unlimited Liability for Noncompliance With an Economic Regulation Should Not Be Created Judicially*

Petitioners incorrectly argue, based upon the Second Circuit's analysis in *LOT*, that the "Montreal Agreement established a separate liability regime." Petitioners' Brief at 22.

Acting on the *Lisi* theory that Article 3 requires "adequate notice" (*see* discussion, *supra* at 28-33), the Second Circuit in *LOT* determined that the Montreal Agreement requires that the perceived Article 3 "adequate notice" must be printed in 10 point type size. *LOT*, 705 F.2d at 89 ("Under the modifying terms of the Montreal Agreement, however, that statement must be in 10-point type".).

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[36] Because it is apparent from the history of Economic Regulation Part 221.175(a) that only CAB (now DOT) enforcement for a violation of the 10 point type size specification was contemplated, noncompliance with the regulation does not give rise to an implied private right of action on behalf of petitioners. *See Thompson* v. *Thompson*, 484 U.S. ——, 108 S.Ct. 513, 516 (1988); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571 (1979); *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).

According to the *LOT* decision, delivery of the Montreal Advice in 8 rather than 10 point type size constitutes "constructive nondelivery" of a ticket under *Lisi* and in turn triggers the Article 3(2) sanction of unlimited liability. *LOT*, 705 F.2d at 89-90. The District Court exposed the error of the *LOT* court as follows:

> [T]he 10-point type requirement [in the Montreal Agreement] has been grafted onto the treaty as the next phase in the attempt to circumvent the treaty provision. *In re Air Crash Disaster at Warsaw, Poland, supra,* [*LOT*] went so far as to construe the "special contract" that was the Montreal Agreement as part and parcel of the treaty, and indeed, to place that new, "modified" provision just where the courts wanted it to be.

Korean Air Lines Disaster, 664 F. Supp. at 1475. (J.A. 412)

The Second Circuit in *LOT* ignored the legal principle that only sovereign states may amend a multilateral treaty such as the Warsaw Convention. *See* Vienna Convention, 63 Am. J. Int'l L. at 876, 887. The "assumption that the Montreal Agreement can operate as an amendment to the Warsaw Convention," as opposed to supplementing the provisions of the Warsaw Convention, is the "basic flaw" both in petitioners' argument and in the Second Circuit's decision in *LOT* linking the treaty sanction to the Montreal Agreement. *See Korean Air Lines Disaster*, 664 F. Supp. at 1476. (J.A. 414)[37]

[37] In addition, the time frame within which the Montreal Agreement was adopted does not support any "historical or functional relationship" between its 10 point type size specification and the treaty sanction in Article 3(2) of the Warsaw Convention for failure to deliver a ticket. In May, 1966, when the international air carriers agreed to the type size specification in the Montreal Agreement, the District Court opinion in *Lisi* was only six weeks old. *See Lisi*, 253 F. Supp. 237 (S.D.N.Y. 1966). Moreover, until the District Court decision in *LOT*, 535 F. Supp. 833 (E.D.N.Y. 1982), no decision in the United States, or anywhere else, had imposed the Article 3(2) treaty sanction for noncompliance with the Montreal Agreement type size specification.

The holding in *Deutsche Lufthansa Aktiengesellschaft* v. *Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973) [*Lufthansa*], relied upon by petitioners, is inapposite. The court in *Lufthansa* held only that the CAB had statutory authority to issue Economic Regulation Part 221.175(a), that the Regulation did not conflict with the Warsaw Convention[38] and, thus, that the CAB had not violated the direction in 49 U.S.C. § 1502, that it act consistently with any convention of the United States, in adopting the Regulation. *Lufthansa*, 479 F.2d at 916-18. The *dictum* in the *Lufthansa* decision to the effect that this Regulation gives Article 3(1)(e) "substantive effect" was based on the erroneous "adequate notice" concept of *Lisi* and failed to consider either the Regulation's history or the CAB's own view of the Regulation as adopted. *Lufthansa*, 479 F.2d at 917-18.

Petitioners' reliance on *Trans World Airlines* v. *Franklin Mint Corp.*, 466 U.S. 243 (1984), is misplaced. In *Franklin Mint*, the Court upheld the authority of the United States to determine the manner in which the liability limit would be converted into national, *i.e.*, United States, currency, as expressly authorized by Article 22(4) of the Convention. 466 U.S. at 261. The express treaty authorization in Article 22(4) for implementation by national or local law in no way supports petitioners' argument that each nation is authorized to "implement" independently the Article 3(2) treaty sanction. Carriers and passengers are permitted, pursuant to Article 22(1), to agree by "special contract" to increase the carrier's limit of liability, as has been done by the Montreal Agreement, but this does not permit modification of the liability rules or the establishment of a "separate liability regime." Petitioners cite no authority to support their arguments

[38] The court in *Lufthansa* noted that even prior to the CAB regulation, the International Air Transport Association [IATA] had promulgated provisions concerning many of the aspects of the passenger ticket. *See Lufthansa*, 479 F.2d at 917 n.8 (IATA Resolution 275 (now 724) first was approved by the CAB on September 1, 1949). (J.A. 324-326)

that Economic Regulation Part 221.175(a) specifying 10 point type size was promulgated as one of the "provisions of the Convention [which] authorized varying implementation by its member nations," and that imposing the treaty sanction of unlimited liability for noncompliance with the Regulation is simply an "implementation" of Article 3 by a United States court. *See* Petitioners' Brief at 23.

It must be emphasized that no relationship exists between the Article 3(2) treaty sanction and the Montreal Agreement type size specification. No language in the Montreal Agreement authorizes the imposition of any sanction for a print size irregularity in the Montreal Advice on the delivered passenger ticket. As the District Court correctly held:

> Nothing in the Montreal Agreement requires that an air carrier provide the statement of liability limitation in 10-point type or lose the benefit of that limitation. Nothing in the debate or dissatisfaction with the limitation which led to the Montreal Agreement confirms the contention that "adequate notice" was an issue.
>
> * * *
>
> While it is indeed correct that the Montreal Agreement must be read in connection with the Warsaw Convention, the resulting Warsaw/Montreal system does not include delimiting liability for failure to provide the statement in 10-point type size. In short, the Montreal Agreement may not be read wholesale into the Warsaw Convention.

Korean Air Lines Disaster, 664 F. Supp. at 1475-1476. (J.A. 412-413)

The *Lisi* and *LOT* decisions are incorrect. They cannot be reconciled with the unequivocal language of the Warsaw Convention, the intent of its drafters and the understanding of its signatories. The court in *Lisi* and *LOT* failed to uphold the duty of the judiciary to enforce a treaty of the United States as written until amended by

its signatories. *See Air France* v. *Saks*, 470 U.S. 392, 406 (1985). As the District Court properly held in rejecting as incorrect the *Lisi* and *LOT* decisions:

> American courts, faced with the prospect of enforcing a limitation which has become outmoded and contrary to domestic law, have taken avoidance of the treaty limitation upon themselves and have arrived at an interpretation of the Wadsaw system which, in cases such as those presented by Plaintiffs here, eliminates the treaty limitation altogether.

Korean Air Lines Disaster, 664 F. Supp. at 1471. (J.A. 404)

Article 3 of the Warsaw Convention—as originally written in 1929, as adopted by the United States in 1934 and as it stands today—remains the supreme law of the land. As the Court recently held, until the Warsaw Convention is changed by its signatories, "it cannot be stretched" to impose liabilities neither created nor intended by its drafters. *Saks*, 470 U.S. at 406. Thus, the court below was correct in holding that the Article 3(2) treaty sanction is imposed only for nondelivery of the passenger ticket as the treaty clearly states.

CONCLUSION

The judgment of the Court of Appeals for the District of Columbia Circuit should be affirmed in all respects.

Respectfully submitted,

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APPENDIX

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Relevant Provisions of the Warsaw Convention

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

49 Stat. 3015

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22(2);

(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

Article 8

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(*j*) The apparent condition of the goods and of the packing;

(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(*m*) The amount of the value declared in accordance with article 22(2);

(*n*) The number of parts of the air waybill;

(*o*) The documents handed to the carrier to accompany the air waybill;

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention.

49 Stat. 3016 & 3017

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

49 Stat. 3017

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was

occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

49 Stat. 3019

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold

Relevant Provisions of the Warsaw Convention

at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

49 Stat. 3019

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

49 Stat. 3020

Montreal Agreement

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.
>
> (2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily in-

jury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger.

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of cer-

tain (name of carrier) and certain other[1] carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement.

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[1] Either alternative may be used.

Montreal Agreement

Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

CAB Agreement 18900 (May 13, 1966)

The following is an actual size reproduction of the Montreal Advice as contained in certain KAL passenger tickets of plaintiffs' decedents printed in 8.0 point modern type size:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of KOREAN AIR LINES CO., LTD. and certain other carriers parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000, or its equivalent per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to pasengers is limited in most cases to approximately U.S. $10,000 or U.S. $20,000, or its equivalent.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information, please consult your airline or insurance company representative.

NOTE: The limit of liability of U.S. $75,000, or its equivalent above is inclusive of Legal Fees and Costs except that in case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of U.S. $58,000, or its equivalent exclusive of Legal Fees and Costs.

NOTICE OF BAGGAGE LIABILITY LIMITATIONS

Liability for loss, delay, or damage to baggage is limited as follows unless a higher value is declared in advance and additional charges are paid: (1) for most international travel (including domestic portions of international journeys) to approximately U.S. $9.07 per pound ($20.00 per kilo) for checked baggage and U.S. $400.00 per passenger for unchecked baggage; (2) for travel wholly between U.S.A. points, to U.S. $750.00 per passenger on most carriers (a few have lower limits). Excess valuation may not be declared on certain types of valuable articles. Carriers assume no liability for fragile or perishable articles. Further information may be obtained from the carrier.

The following is an actual size reproduction of the Montreal Advice in 10 point modern type size:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of KOREAN AIR LINES CO., LTD. and certain other carriers parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000, or its equivalent per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to pasengers is limited in most cases to approxmately U.S. $10,000 or U.S. $20,000, or its equivalent.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information, please consult your airline or insurance company representative.

NOTE: The limit of liability of U.S. $75,000, or its equivalent above is inclusive of Legal Fees and Costs except that in case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of U.S. $58,000, or its equivalent exclusive of Legal Fees and Costs.

Relevant Economic Regulations

§ 203.4 *Montreal Agreement as part of airline-passenger contract and conditions of carriage.*

(a) As required by the Montreal Agreement, carriers that are otherwise generally required to file tariffs shall file with the Board's Tariff Division a tariff that includes the provisions of the counterpart to CAB Agreement 18900.

(b) As further required by that Agreement, each participating carrier shall include the Agreement's terms as part of its conditions of carriage. The participating carrier shall give each of its passengers the notice required by the Montreal Agreement as provided in § 221.175 of this chapter.

(c) Participation in the Montreal Agreement, whether by signing the Agreement, filing a signed counterpart to it under § 203.3, or by operation of law under § 203.5, shall constitute a special agreement between the carrier and its passengers as a condition of carriage that a liability limit of not less than $75,000 (U.S.) shall apply under Article 22(1) of the Warsaw Convention for passenger injury and death. Such participation also constitutes a waiver of the defense under Article 20(1) of the Convention that the carrier was not negligent.

14 C.F.R. § 203.4

§ 203.5 *Compliance as condition on operations in air transportation.*

It shall be a condition on the authority of all direct U.S. and foreign carriers to operate in air transportation that they have and maintain in effect and on file with the Board as signed counterpart of CAB Agreement 18900,

and a tariff (for those carriers otherwise generally required to file tariffs) that includes its provisions, as required by this subpart. Notwithstanding any failure to file that counterpart and such tariff, any such air carrier or foreign air carrier issued license authority (including exemptions) by the Board or operating in air transportation shall be deemed to have agreed to the provisions of CAB Agreement 18900 as fully as if that air carrier or foreign air carrier had in fact filed a properly executed counterpart to that Agreement and tariff.

14 C.F.R. § 203.5

§ 213.7 *Filing requirements for adherence to Montreal Agreement.*

It shall be a condition upon the holding of a foreign air carrier permit or other authority authorizing direct foreign scheduled air transportation that the holder have and maintain in effect and on file with the Board a signed counterpart of CAB Agreement 18900 (CAB Form 263), and a tariff (for those carriers otherwise generally required to file tariffs) that includes its provisions, and comply with all other requirements of Part 203 of this chapter. That form can be obtained from the Publications Services Division, Civil Aeronautics Board, Washington, D.C. 20428.

14 C.F.R. §213.7

§ 221.38 *Rules and regulations.*

(j) *Notice of limitation of liability for death or injury under the Warsaw Convention.* Notwithstanding the provisions of paragraph (h) of this section, each air carrier and foreign air carrier shall publish in its tariffs a provision stating whether it avails itself of the limitation on

liability to passengers as provided in Article 22(1) of the Warsaw Convention or whether it has elected to agree to a higher limit of liability by a tariff provision. Unless the carrier elects to assume unlimited liability, its tariffs shall contain a statement as to the applicability and effect of the Warsaw Convention, including the amount of the liability limit in dollars. Where applicable, a statement advising passengers of the amount of any higher limit of liability assumed by the carrier shall be added.

14 C.F.R. § 221.38(j)

§ 221.175 *Special notice of limited liability for death or injury under the Warsaw Convention.*

(a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATIONS OF LIABILITY

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $10,000.

Relevant Economic Regulations

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, That when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as 10-point modern type and in ink contrasting with the stock on:

(1) Each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) the ticket envelope; *And provided further,* That a carrier which has heretofore been furnishing a statement including either the sum of "$8,290" or the sum of "$9,000," in place of the sum of "$10,000" in the text of the statement prescribed by this paragraph, may continue to use such statement until July 15, 1974.

14 C.F.R. § 221.175(a)

Excerpts from The Hague Minutes

I, ICAO

[65] *Mr. Goodfellow* (IUAI—ICC) wished to make the position of the ICC perfectly clear. In his remarks on the preceding day he had said that the ICC were in agreement with the IUAI as to the undesirability of including details as to the documents of carriage in the Convention. The actual texts of the two ICC resolutions were as follows. The Vienna Resolution of 1952 read:

> "All details concerning such documentation should be omitted from the Convention and the precise form of the documents should be left to air carriers and users to evolve in the light of commercial experience."

That text had been slightly modified by the Tokyo Resolution following consideration of the latest ICAO draft. After welcoming the simplifications proposed by the ICAO Legal Committee, the ICC went on to say:

> "Details of the particulars to be included in the passenger ticket and baggage check should not be laid down in the Convention. Some form of ticket and baggage check is necessary but its description in the Convention, if any, should be kept as simple as possible."

That made the position of the ICC quite clear.

He now wished to answer the arguments put forward in Mr. Garnault's speech. He could find only two legal arguments in that speech.

The first argument was that, in internal carriage under the British order-in-council, the passenger knew what rules of liability applied, **[66]** whereas in international carriage

he might not know this. That argument must be based on the legal theory that every citizen was supposed to know the law, and, as the Warsaw Convention was incorporated in the national laws of each country that ratified the Convention, it applied with equal force to internal or international carriage.

In the second place, Mr. Garnault had emphasized that, if there were embarrassment in the issuance of documents of carriage, he preferred that the traffic clerk of the air carrier should be the one to be embarrassed rather than the passenger. The proposition which Mr. Garnault supported imposed, under the Rio text, an impossibility on the air carrier coupled with the sanction of unlimited liability if the carrier failed to achieve the impossible. No one knew better than Mr. Garnault how difficult it was for even a trained lawyer to be absolutely certain whether the Convention applied or not to certain classes of carriage. Therefore, to require the air carrier to say, as a matter of fact, whether the Convention did apply to a particular contract of carriage was to put the carrier in an impossible position.

The suggestion had been made that, if the Convention did not provide for a specified form of passenger ticket and impose a sanction for non-compliance with that form, carriers would not issue a ticket in proper form. That was completely contrary to the experience of the last twenty-five years. *During that period the industry had been operating under a convention in which there had been no sanction for failure to adopt the form of ticket recommended in Article 3(1) of the Convention.* Yet, if one looked at the airline tickets, it would be seen that every ticket did its best to comply with the conditions laid down in that article. The one thing which the ticket could not do

was to say positively that the Convention applied. What the tickets did do was to say that the Convention rules applied unless the carriage was not international as defined under the Convention. It had to be borne in mind that the documents of carriage were not used only by the big IATA airline companies, but by irregular carriers and charter companies all over the world and that what was possible for a big airline was not always possible or practical from the point of view of the smaller operators. Mistakes did occur and it was unworthy of a convention of this nature that those mistakes, committed in all good faith, should involve the carrier in the Draconic sanction of unlimited liability—the same sanction as was applied to wilful misconduct.

The effect of the sanction was very clearly indicated in what had happened in the carriage of air freight. There, the sanction of unlimited liability did apply if the essential particulars were omitted. The consequence was that there was more litigation under Articles 8 and 9 than under any other article except Article 25. That litigation was not between the owners of the goods and the air carriers, but between the insurers of the goods and the insurers of the air carrier's liability. There was some very expensive litigation on foot with many outstanding cases. Whatever might be the result, the cost of that litigation ultimately was passed on to the public. In the first place, it was passed on to the air carrier by way of increased premiums, and then, by him, in turn, it must be passed on to the consignors of goods. That was an example of how this sanction worked out in practice. He was sure that this was not the intention that the drafters of the original Convention had had in mind.

[67] Another point to bear in mind was that it was this chapter on documents of carriage alone which had pre-

vented the use of a negotiable air waybill ever since the Convention had been adopted.

In revising the Convention, the Conference should be looking 25 years ahead, a point which had been stressed by Mr. Alten who, although the oldest delegate there, had, perhaps, the youngest outlook in that connection. Mr. Alten had said that a passenger ticket for air travel should aim at the [*sic*] being just as simple as a railway ticket. That was the ideal the Conference should aim at. Legal considerations made it necessary that there should be a contract. There would always be a contract and documents of carriage, because it was as much in the interests of the air carrier as of the passenger to be able to prove what the contract of carriage was. But, if in this Convention, the Conference sought to tie the carrier down to a definite form of document and to impose very heavy sanctions for failure to conform to the Convention, he was afraid that it would be a very long time before the ideal of Mr. Alten was achieved.

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[80] *Mr. Goodfellow* (IUAI) said that it had been suggested, that in relation to particulars to be included in the tickets, the Protocol imposed **[81]** a less heavy burden on the carrier than the present Article 3. *He could not agree with this, since the Convention, unlike the Protocol, did not impose a sanction on the carrier for failure to include the statement concerning liability.* Therefore, whatever wording was adopted for Article III(a), any sanction which was imposed would make the position of the carrier unnecessarily worse.

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[84] *Mr. Ambrosini* (Italy) wished to return to the text of Article 3 of the Warsaw Convention in order to defend

it. There was a remarkable difference between this text and the corresponding text of the Rio Protocol. According to the text of the old Convention there was a sanction only in the case where the passenger ticket had not been delivered, while, in the case of the Protocol, there were two instances in which the carrier might have unlimited liability: where he accepted a passenger without a passenger ticket having been delivered and if the ticket did not include the statement that the carriage was subject to the rules relating to liability established by the Convention. Beyond doubt, the text of the old Convention was more favourable to the carrier than the Protocol.

In regard to a question of detail, he pointed out that the old text used the words "which exclude or limit his liability". It appeared to him that all the Delegates were in agreement to delete the words "exclude or".

With regard to the effect of the present Convention, he pointed out that the sanction of unlimited liability in the case of the absence of the passenger ticket was not very serious, since, according to the text of the Convention, the passenger had to prove that he had been *accepted* without delivery of the passenger ticket. But, it was not possible that the passenger might, in every case, be able to claim unlimited liability due to the fact that there was no passenger ticket as, for example, in the case of a stowaway. He must, above all, prove that the carrier had *accepted* him without wishing to give him the passenger ticket or without being able to give him the ticket.

[85] What about the question of damage sustained by the passenger? Either there would be no damage or what damage there might be, need not be very great. The passenger would have made his journey and arrived at his destination. What grounds would he have for claiming

compensation? In this case, the passenger who might suffer damage would almost always be within the limits of the Convention. If this were so, then the sanction in the Convention was not very serious.

He agreed with the Australian Delegate that there should not be a public law sanction but a private law sanction. Therefore, he was opposed to the proposal made by the United Kingdom Delegate to refer the matter to national legislations. Under that proposal each State could do what it wished and hand down arbitrary decisions. If States were left free to enact different rules, there would no longer be any uniformity of law. Consequently, he was opposed to having a public law sanction.

II, ICAO

Article III

[243]

83. *Comments and Proposals of the United States*

a) *Amendment of Articles III to VII, IX and XI of the draft Protocol*

In Article 3—

(a) Paragraph 1 shall be deleted and replaced by:

"(1) For the carriage of passengers a ticket shall be delivered containing the following particulars:

(a) The place and date of issue;

(b) The places of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not

have the effect of depriving the transportation of its international character.

(d) The statement set forth below, printed in a color which contrasts with the other printing and with the ticket stock:

'*Advice to International Travellers* (in letters not less than ½ centimeter high)

Travellers embarking upon a journey involving an ultimate destination or stop in a country other than the country of origin are advised that the Warsaw Convention may be applicable to their journey. The Convention governs the liability of carriers to passengers and shippers and limits liability for personal injury or death in most cases to—Poincaré gold francs'."

(b) Paragraph 2 shall be deleted and replaced by:

"(2) The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or validity of the contract of carriage which shall, none the less, be subject to the rules of the Convention. Nevertheless if the carrier accepts the passenger without a passenger ticket having been delivered or if the ticket does not include the statement in the form required by Paragraph (1) relating to the applicability of the Convention he shall not be entitled to avail himself of any of the defenses which exclude or limit his liability."

Excerpts from the Warsaw Minutes

[47] Mr. Ripert (France): Sirs, since the amendments of the French Delegation have been reproached as upsetting the essence of the draft of the Convention which has been presented, I would like to remind the members of the conference of the history of Article 22 and to show that, far from upsetting the draft, it is we who reestablish it under its original form.

Those who did not participate in the work of the CITEJA and who read this article can imagine that it creates a favorable system in favor of the carrier. They say: Why not apply the common law to him?

Well, in reality, this Convention creates against the air carrier an exceptional system, because in the majority of the countries of the world, contracts of carriage are concluded under a system of free contract. The carrier is free to insert in the contract clauses which exclude or reduce his liability, as much for goods as for travelers. You are of course aware that they have lost no opportunity to do so, and presently many air carriers operate under this unregulated contractual system, and, in practice, in fact, they are not liable.

One has desired to impose upon them a compulsory system of liability. It must not be forgotten that this Convention declares null and void all clauses which would regulate the liability otherwise than does the text upon which you will be called to vote. It is thus compulsory law for all the carriers, a liability law which is imposed upon them. But, consequently, it was natural not to impose on them common law liability. It's in the spirit of compromise that one has said: All that can be asked from the air carrier is to take reasonable measures to avoid the damage, to have his aircraft in good flying condition, [48] and to make sure that they are well flown. If errors of navigation occur thereafter, the consignors with their goods, the

passengers in their persons, would bear the consequences thereof.

This system has been adopted, why? Because it is the system which had been agreed upon in maritime navigation, however more ancient than air navigation, and that was not retained; not because one is of a traditionalist spirit, but simply because one considers that there are exceptional risks of the sea in which it is just that consignors of goods and the passengers participate.

The essence of the draft of the CITEJA was that if the carrier had taken all reasonable measures, there would be no liability for him in the course of operation, that the consignors of goods and the passengers would cover themselves by insurance. It is following amendments presented within the CITEJA that the incidental sentences were introduced, and it is sufficient to note the wording of the text as it is presently presented to be convinced that successive amendments are involved.

One has required a different system for the carriage of passengers and goods: There is no legal reason why the liability of the carrier be regulated differently for passengers and for goods.

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[245] REPORT

presented in the name of the
International Technical Committee
of Aeronautical Legal Experts
by Mr. Henri De Vos, Reporter,

on the Preliminary Draft of a Convention
relating to documents of air carriage and
to the liability of the carrier in
international carriage by aircraft.

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Excerpts from the Warsaw Minutes

[247] CHAPTER II
Documents of Carriage

Section 1—Passenger Ticket

A special document is provided for carriage of passengers. This document is necessarily different from those used for carriage of baggage and the circulation of goods.

This baggage ticket must contain only a minimum of particulars.

Moreover, the sanction provided for for [*sic*] carriage of passengers without a ticket or with a ticket not conforming to the Convention is identical to that provided for, for carriage of baggage and goods.

This sanction formula constitutes a compromise between the different opinions of the governmental delegations to the CITEJA of which some asked that the document of carriage be compulsory certain of them with civil sanctions and others with penal sanctions, and others defended the principle of freedom of contract.

Ludecke v. Canadian Pacific Airlines Ltd.

Supreme Court of Canada, Martland, Ritchie, Pigeon, Estey and McIntyre, JJ.
March 20, 1979.

* * *

[53] APPEAL from a judgment of the Quebec Court of Appeal, 53 D.L.R.(3d) 636, dismissing an appeal and allowing an incidental appeal from a judgment of Challies, J., on a question of law arising out of a contract for carriage by air.

Peter R. Lack, for appellant.
W.S. Tyndale, Q.C., for respondent.

The judgment of the Court was delivered by

MCINTYRE, J.:—This is an appeal from the Court of Appeal for Quebec which allowed, in part, an appeal from the judgment of the Superior Court of that Province. The appellant, as widow of the deceased and next friend of her two infant children, sued the respondent in the Superior Court for damages resulting from the death of her husband, one G. T. Hodge, in a crash in Tokyo on March 4, 1966, of a commercial aircraft owned and operated by the respondent, who will hereafter be referred to as the "carrier". The deceased, a passenger on the aircraft, had a ticket, which also served as a baggage ticket, issued in England by a travel agent acting for British Overseas Airways Corporation. His trip commenced in London, took him to Delhi, Hong Kong and finally to Tokyo. The passage from Hong Kong to Tokyo was by the carrier on its aircraft. It was a successive carrier to British Overseas Airways Corporation within the meaning of the *Carriage by Air Act*, 1939 (Can.), c. 12 (R.S.C. 1952, c. 45 [now R.S.C. 1970, c. C-14]), and the *Carriage by Air*

Act, 1932 (U.K.), c. 36. These statutes introduced into the law of the two countries the *Warsaw Convention, 1929* [see Sch. I, R.S.C. 1970, c. C-14], an international convention governing international carriage by air. This appeal involves consideration of arts. 3 and 4 of the Convention reproduced hereunder in an English translation of the original French text:

Article 3

(1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) the place and date of issue;

(*b*) the place of departure and of destination;

[54] (*c*) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercised that right, the alteration shall not have the effect of depriving the carriage of its international character;

(*d*) the name and address of the carrier or carriers;

(*e*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(2) The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be

entitled to avail himself of those provisions of this Convention which exclude or limit the liability.

Article 4

(1) For the carriage of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) the place and date of issue;

(*b*) the place of departure and of destination;

(*c*) the name and address of the carrier or carriers;

(*d*) the number of the passenger ticket;

(*e*) a statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) the number and weight of the packages;

(*g*) the amount of the value declared in accordance with Article 22(2);

(*h*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(4) The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless,

if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*) *and* (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability.

The limitations of liability were provided for in art. 22 of the Convention. Liability for each passenger was, in the absence of any special contract with the carrier, fixed at a maximum of 125,000 francs and for loss of baggage 250 francs per kilogram.

The appellant advanced two claims—one based upon the death of her husband and the other upon the loss of his baggage. The carrier, while admitting liability, contended that its liability was limited in accordance with the terms of the Convention. Two questions thus arose for determination:

[55] (1) Did the limitation of liability of the *Warsaw Convention, 1929* apply to the claim based on the death of her husband?; and

(2) Did the limitation of the Convention apply to the claim for loss of baggage?

The actual ticket issued to the deceased was destroyed in the crash. For evidentiary purposes, ex. P-2 was introduced at trial. The agreed statement of facts provided in para. 7:

> 7. That BOAC Passenger Ticket and Baggage Check No. 0614-0000-0000, marked "Specimen Ticket", produced herewith as Exhibit P-2, and to avail as though here in full reproduced, is identical as to cover, size

> and number of pages as well as printed material and size of print as the BOAC airline ticket that had been issued to the late Gerard T. Hodge and used by him at the times and in respect to the flights referred to above.

References to the ticket in this judgment are references to ex. P-2.

Immediately below where the name of the deceased appeared on each of the flight coupons, or pages of the ticket, reference was made to the Convention in the following terms in 4½ point type:

> If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention covers and in most cases limits the liability of carrier for death or personal injury and in respect of loss of or damage to baggage.

On each flight coupon appeared the words "issued by British Overseas Airways Corporation subject to conditions of contract inside the front cover". The words "issued by" and the words referring to the conditions of contract were in type somewhat larger than 4½ point but smaller than the type used for "British Overseas Airways Corporation". The conditions of contract were in 4½ point type and para. 2(a), as far as it is relevant for these purposes, was in the following terms:

> 2(a) Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention unless such carriage is not international carriage as defined by the Convention.

inside the back cover of the ticket, in type somewhat larger than 4½ point, appeared the following words:

> Liability of carrier in respect of baggage and other personal property is limited in respect of its declared value which shall not exceed $16.50 (U.S. currency) or its equivalent per kilogram for checked baggage and $330.00 (U.S. currency) or its equivalent per passenger for unchecked baggage, unless a higher valuation is declared in advance and additional charges are paid pursuant to carrier's tariffs.

[56] Upon an agreed statement of facts, the essentials of which have been cited above, the parties, pursuant to art. 448 of the *Code of Civil Procedure*, 1965 (Que.), c. 80, submitted a question of law with a joint factum in these terms:

> *Question of Law:*
>
> That this submission relates and applies solely and exclusively to the question of law as to whether, based upon the facts hereinabove set forth and the contents of the Exhibits forming part of the said facts, the Defendant is entitled to avail itself of those provisions of the First Schedule to the Canadian and U.K. Carriage by Air Acts (Warsaw Convention) referred to above, which limit the liability of Defendant towards Plaintiff for damages claimed by the latter as a result of the crash of Defendant's aircraft at Tokyo International Airport, Tokyo, Japan, on March 4th, 1966.

To understand the judgments in the Superior Court and the Court of Appeal, it may be helpful to explain the dif-

fering views which have been expressed on the construction of art. 3 of the Convention. American Courts, dissatisfied with the harsh provisions of the Convention on the question of limitation of liability, have construed art. 3(2) to require not only the delivery of a ticket but of one which, in accordance with art. 3(1), contains in legible form a statement that the carriage is subject to the rules relating to liability established by the Convention. They have also held that delivery must allow reasonable time for examination. They have considered that delivery of a ticket not meeting such conditions amounts to no delivery and therefore the provisions of art. 3(2), depriving the carrier of the benefit of the limitation where a passenger is accepted without a ticket, would apply. Several American cases are conveniently collected and discussed by Georgette Miller in her book *Liability in International Air Transport* (1977), pp. 82-5. They include *Lisi* v. *Alitalia Linee Aeree Italiane S.p.A.*, 9 Avi. 18,120 (S.D.N.Y. 1966), affd 9 Avi. 18,374 (2nd Cir. 1966), affd 390 U.S. 455 (U.S.S.C. 1968); *Warren* v. *Flying Tiger Line*, 9 Avi. 17,621 (S.D. Cal. 1964), revd & remd, 9 Avi. 17,848 (9th Cir. 1965); *Mertens* v. *Flying Tiger Line*, 9 Avi. 17,187 (S.D.N.Y. 1963); affd & remd, 9 Avi. 17,475 (2d Cir. 1965).

Another view which appears to have been accepted in most jurisdictions outside of the United States is that Article 3 fails to provide any sanction for its breach except in a case where a passenger has been accepted with no ticket. Therefore a ticket bearing an illegible statement or no statement at all would not result in a loss of the limitation to the carrier.

The trial Judge dealt with the formal question of law by answering the two questions set out earlier. He answered the first question dealing with the death claim

"yes" thus according the [57] limitation to the carrier. In this, it is clear that he did not apply the American test. He read art. 3 literally and adopted the view that no sanction could be applied where a ticket was delivered. He answered Q. 2 dealing with the baggage claim "no" thus denying the carrier the benefit of the limitation essentially for the reason that art. 4, unlike art. 3, contained a sanction for its breach and anything printed on the ticket purporting to be in compliance with art. 4 was so illegible as to amount to non-compliance.

The appellant appealed against the holding that the carrier was entitled to the benefit of the limitation of liability on the death claim. The carrier, by incidental appeal, sought a reversal of the holding that it was not entitled to the benefit of the limitation on the baggage claim.

The Court of Appeal, while rejecting the trial Judge's view that art. 3 contains no sanction for non-compliance, dismissed the death claim. Casey, J.A., said [53 D.L.R. (3d) 636 at p. 638]:

> This reasoning is not acceptable. The limitation contemplated by the Convention must be earned: the carrier must deliver a ticket which satisfies the mandatory requirements of art. 3(1) which article is in effect, a definition. If the ticket delivered does not satisfy these requirements it is not a ticket within the meaning of that article and the sanction of art. 3(2) will apply.
>
> However, appellant has two other hurdles: she must establish either that the ticket does not contain "a statement that the carriage is subject to the rules relating to liability established by this Convention" or, that the statement, if there is one, is not legible.

He then went on to hold that the words printed on the ticket were legible and sufficient in content to satisfy the requirements of the Convention and he dismissed the appeal. For the same reason, he allowed the incidental appeal holding, in the result, that the carrier was entitled to the limitation of liability provided by the Convention on both death and baggage claims. In this he applied the American test.

In my opinion, the words of art. 3(2) are plain and can admit of no misunderstanding. The absence, irregularity or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage. The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred to above which hold that delivery of a ticket with an irregularity, that is, a statement as required by art. 1[*sic*](*e*) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give effect to a precise statement of the law. I am unable, however harsh and unreasonable I may consider the limitation, to adopt the American test. It is clear in this case that the carrier [58] delivered a ticket and thus preserved its right to the limitation. For these reasons, it is my opinion that the trial Judge correctly answered Q. 1 and in so doing he properly construed art. 3. In view of the fact that the Court of Appeal reached, though for different reasons, the same conclusion, I would dismiss the appeal in respect of Q. 1.

As to the second question, the trial Judge recognized that, unlike art. 3, art. 4, which governed baggage claims, did provide a sanction. Because, in his opinion, the print was illegible on the ticket, he considered it did not contain the particulars set out in paras. (*d*), (*f*) and (*h*) of

art. 4(1). He therefore applied the sanction and denied the limitation to the carrier.

Casey, J.A., in the Court of Appeal, reversed this finding and I find myself in agreement with him on this question. An examination of the ticket satisfies me that the print was of such type and arrangement as to be legible by the ordinary person using ordinary diligence and the content of the ticket was adequate to meet the requirements of the Convention. I consider the ticket complied with art. 4 and, therefore, would dismiss the appeal on Q. 2 and accord the limitation to the carrier.

In argument in this Court, the case of *Montreal Trust Co. et al.* v. *Canadian Pacific Airlines Ltd. et al.* (1976), 72 D.L.R.(3d) 257, [1977] 2 S.C.R. 793, 12 N.R. 408, was fully discussed. Counsel for the appellant argued that it should lead to an allowance of this appeal. In my view, however, the *Montreal Trust Co.* case does not afford assistance to the appellant. It arose out of the same crash as did the case at bar. The deceased, Stampleman, had purchased an Air Canada ticket in Canada and his trip began and was to end in Canada. The present respondent was a successive carrier to Air Canada on that portion of the trip from Hong Kong to Tokyo where he perished. In that case, the *Warsaw Convention, 1929,* as modified by The Hague Protocol, Sch. II (September 28, 1955), governed the question because Canada had become a party to the Protocol through the enactment of "An Act to Amend the Carriage by Air Act", 1963 (Can.), c. 33. The same question arose in each of the Stampleman and Ludecke cases but different provisions must govern the answer.

Article 3 of The Hague Protocol provides:

Article 3

(1) In respect of the carriage of passengers a ticket shall be delivered containing:

[59] (*c*) a *notice* to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

(2) The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, *or if the ticket does not include the notice required by paragraph (c) of this article, the carrier shall not be entitled to avail himself of the provisions of Article 22.*

(Italics added.) It will be seen that a notice is required in place of a statement and failure to comply will deprive the carrier of the benefit of the limitation under art. 22. Article 4 also uses the word "notice" instead of "statement".

Ritchie, J., speaking for the majority of this Court, said at pp. 263-4 D.L.R., p. 802 S.C.R.:

In relation to a claim for loss of life, art. 3(1) of the Convention, as I have said, merely required "a statement" and furthermore under that article the absence of that "statement" did not preclude the carrier from limiting its liability provided that the ticket was "delivered". The amended article as contained in the Protocol not only requires a "notice" but the absence of such "notice" denies the carrier the benefit of art. 22. The "notice" required by the Protocol and the statement required by the Convention are therefore two completely different requirements with radically different effects and with the greatest respect I think that the Court of Appeal erred in applying the reasoning which had been used in the *Ludecke* case in interpreting the Convention to the interpretation of the Protocol in the present case.

I am of the opinion that with these words he effectively distinguished between the two cases. Whether a different result would have followed in the case at bar if The Hague Protocol had been the governing statutory provision does not arise in this case.

I would dismiss the appeal. In the circumstances of this case, I would direct that the parties pay their own costs.

Appeal dismissed.

Montreal Trust Co. et al. v. Canadian Pacific Airlines Ltd. et al.

Supreme Court of Canada, Laskin, C.J.C., Martland, Judson, Ritchie, Spence, Pigeon and Dickson, JJ.
December 20, 1976.

[258] Appeal from a decision of the Quebec Court of Appeal allowing an appeal from a judgment of Challies, A.C.J., in favour of the plaintiff in an action to recover damages for the death of an air line passenger.

Peter R. Lack, for appellants.
W. S. Tyndale, Q.C., and *Alastair Paterson*, Q.C., for respondent.
D. Jack, for intervenant, Dora Hallam.

Laskin, C.J.C., concurs with Ritchie, J.

Martland, J., concurs with Judson, J.

Judson, J. (dissenting):—The Quebec Court of Appeal has stated the issues in this appeal in clear and simple terms. First, did the ticket which was issued to the deceased passenger comply with the requirements of the *Warsaw Convention, 1929*, as amended by The Hague Protocol, so as to limit the carrier's liability? Second, was this notice reasonably legible and comprehensible? Their answer to both questions was "Yes" and they allowed the appeal and dismissed the action.

I agree entirely with their reasons for judgment and I would dismiss this appeal.

Ritchie, J.:—This is an appeal from a judgment of the Court of Appeal of the Province of Quebec allowing an appeal from the judgment rendered at trial by Challies, A.C.J., and declaring that Canadian Pacific Airlines Limited was entitled to limit its liability in accordance with

the provisions of art. 22 of the First Schedule of "An Act to amend the Carriage by Air Act" (The Hague Protocol), 1963 (Can.), c. 33, s. 3, with respect both to the death of the late Irving Joseph Stampleman and to the loss of his baggage as a result of the crash of one of the respondent's aircraft at Tokyo on March 4, 1966.

The appellants being the executor and the two surviving sons of the late Stampleman, commenced this action by writ of summons and declaration dated February 24, 1964, and submitted the following question of law for the decision of the Court in accordance with a joint statement of law and fact filed pursuant to art. 448 of the *Code of Civil Procedure*, 1965 (Que.), c. 80:

[259] *Question of Law*

> That this submission relates and applies solely and exclusively to the question of law as to whether, based upon the facts hereinabove set forth and the contents of the Exhibits forming part of the said facts, the Defendant is entitled to avail itself of the provisions of Article 22 of the First Schedule of the aforesaid "Act to amend the Carriage by Air Act (the Hague Protocol) which limits the liability of the Defendant towards Plaintiffs as to the amount of damages payable by Defendant to Plaintiffs as a result of the death of Joseph Irving Stampleman in the crash of Defendant's aircraft at Tokyo International Airport, Tokyo, Japan on March 4, 1966 and as a result of the loss or destruction of the registered baggage of the late Mr. Stampleman.

The rights and liabilities of the parties are governed by the *Carriage by Air Act*, R.S.C. 1970, c. C-14, Sch. I,

which incorporates in the law of Canada the French text *of the Warsaw Convention, 1929* as amended at The Hague in 1955, Sch. II (hereinafter referred to as "The Hague Protocol").

At the time of the crash Joseph Stampleman was travelling under a ticket issued by Air Canada on its own behalf and on behalf of successive carriers including the respondent. The ticket served as both passenger ticket and baggage check and the contemplated voyage was from Montreal to Vancouver to Hong Kong to Tokyo and return to Montreal. At the relevant time Canada, unlike the United Kingdom and Japan, was one of the high contracting parties to The Hague Protocol and it is the fact that the round trip began and ended in Canada which makes that the governing document.

The air ticket and baggage check in question are attached as exhibits to the agreed statement of facts and their contents are well summarized in the reasons for judgment of Mr. Justice Challies where he says·

> The ticket and baggage check, exs. P-1 and P-2 (ticket No. 014491120008), issued to the deceased by Air Canada contains near the top "subject to conditions of contract on page 2" which is readable with the naked eye and also in four and a half point type across the bottom the following reference to the Warsaw Convention: "If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

Less than a month before rendering judgment in the present case (*i.e.*, December 31, 1971) Challies, A.C.J., had decided the case of *Ludecke* v. *Canadian Pacific Airlines Ltd.*, S.C.M. 746 832, in the Superior Court. That case arose out of the death of a passenger in the same air crash as Stampleman and the agreed question of law there posed under art. 448, *C.C.P.*, was similar in all respects to the question here at issue except that in the case of *Ludecke* it related to the defendant's right to limit its liability in accordance with the provisions of the *Warsaw Convention, 1929* whereas the present [260] question is directed to the rights under The Hague Protocol amending that Convention.

In the *Ludecke* case Challies, A.C.J., held that the statement in the air ticket in question that "carriage is subject to the rules and limitation in relation to liability established by the Convention" printed as it was in four and a half point type was not a "Statement" as required by art. 4 of the Convention and that the carrier was therefore not entitled to limit its liability as to baggage but that it was covered by the limitation provision with respect to the limitation provision for loss of life because of the wording of art. 3 of the Convention.

In the same case, Casey, J.A., speaking for the Court of Appeal (1974), 53 D.L.R.(3d) 636, found that the "statements" in four and a half point type in the ticket were reasonably readable and constituted compliance with the requirements of arts. 3 and 4 of the Convention so as to entitle the carrier to limit its liability as to any baggage claim and the claim for loss of life.

This judgment was not rendered until December 23, 1974. In the meantime (*i.e.*, December 31, 1971), Challies, A.C.J., rendered a judgment for the Superior Court in

the present case in which he recognized the difference in wording between arts. 3 and 4 of the Convention which governed the *Ludecke* case and those articles as they had been amended by The Hague Protocol which governed here, but nevertheless stated that "for the reasons given by the undersigned in *Ludecke* v. *C.P.A.*", the carrier was not entitled to limit its liability as to either loss of life or loss of baggage.

In reversing this judgment, Casey, J.A., speaking on behalf of the Court of Appeal, concluded by saying of The Hague Protocol:

> There are only two questions involved—did the ticket include the notice required by arts. 3(1)(c) and 4(1)(c) and was this notice reasonably legible and comprehensive. As in the case of *Ludecke* my answer to both questions is yes and for this reason I would maintain this appeal.

In my view the answer to the question raised by this appeal must depend upon whether or not the Court of Appeal was justified in relying upon its own interpretation of arts. 3 and 4 of the Convention in deciding a case which is governed by the same articles as amended by The Hague Protocol. The determination of this issue requires a consideration of the terms of these articles which provide:

[261]

WARSAW CONVENTION

Article 3

(1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

. . . . . .

(*e*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(2) The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, *if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability.*

Article 4

(1) For the carriage of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

. . . . . .

THE HAGUE PROTOCOL

Article 3

(1) In respect of the carriage of passengers a ticket shall be delivered containing:

. . . . . .

(*c*) a *notice* to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers *for death or personal injury and in respect of loss of or damage to baggage.*

(2) The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, *or if the ticket does not include the*

WARSAW CONVENTION

(3) The baggage check shall contain the following particulars:

. . . . . .

(*h*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(4) The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of the Convention. Nevertheless if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out in . . . and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability.

(The italics are my own.)

THE HAGUE PROTOCOL

notice required by paragraph (1)(c) of this article, the carrier shall not be entitled to avail himself of the provisions of Article".

Article 4

[The relevant portions of which read:]

(1) In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph (1), shall contain:

. . . . . .

(*c*) a notice to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage.

[262] The Hague amendments, in so far as they affect the present issue, are notable for the fact that (1) the Convention simply required the inclusion in the ticket of "a statement" relating to the limitation of the liability of the carrier as established by the Convention, whereas the amendment provided that such a statement should take the form of a "notice", and (2) that the amendment provided that in the absence of a "notice" the carrier is not entitled to avail himself of the limitation provisions in respect either of death or loss of baggage, whereas the Convention contains no such sanction with respect to claims for loss of life except in the case of no passenger ticket "having been delivered" to the claimant.

In holding that the company was not entitled to limit its liability for loss of the baggage in the *Ludecke* case, Challies, A.C.J., relied heavily on a number of American authorities to the effect that the "statement" in the ticket required by the Convention must be in such form as to afford the passenger "a reasonable opportunity to take self-protective" measures to compensate himself for the limitation on his rights which art. 22 creates in favour of the carrier.

The cases of *Mertens* v. *Flying Tiger Line, Inc.* (1965), 341 F.2d 851, and *Lisi* v. *Alitalia-Linee Aeree Italiene* (1966), 370 F.2d 508, are cited with approval by Mr. Justice Challies. In the latter case, MacMahon, D.J. [253 F. Supp. 237 at p. 243], speaking of a ticket containing the required "statement" in the same print as that in the present case, described it as "virtually invisible" and also as "diminutively sized and unemphasized by bold face type, contrasting colour, or anything else".

In allowing the appeal in the *Ludecke* case, Casey, J.A., declined to follow the American authorities, saying [at p. 638]:

> What I cannot concede is that we must accept the decisions cited by appellant as establishing the standards by which the legibility of this "statement" must be judged. My view is that on this matter of fact the Convention should contain its own criteria. Since it does not I see no reason why we should treat this case differently from the others that come before this Court. Proceeding from this premise and having examined the relevant documents I conclude that the Carrier did print these "statements" in reasonably readable type.

I think it must be understood that limitation on the liability of the carrier created by art. 22 of the Convention in both its original and its amended form constitutes an encroachment on the rights of the individual passenger and as such it is to be strictly construed and can only be invoked when the requirements of the article have been exactly complied with.

The effect of art. 3(2) of the Convention was to empower carriers to limit their liability to passengers by the simple process of delivering a ticket containing a "statement that the carriage is subject [263] to the rules relating to liability established by the Convention" and the Court of Appeal has held in the *Ludecke* case that this requirement is met even when the "statement" is inconspicuously placed in four and a half point type. When the amendments were made by The Hague Protocol of 1955, an entirely new art. 3(2) was promulgated in which the requirement of a mere "statement" was deleted and the more elaborate provisions of the Protocol were substituted therefor. Under the amended art. 3(1)(*c*), the carrier is not only required to insert a "notice" but the terms of the notice are expressly provided for.

I do not think it can be assumed that the draftsmen of The Hague Protocol made the extensive changes which they did in art. 3 without weighing the words which they employed with some care and I cannot accept the suggestion that the substitution of the word "notice" for "statement" in arts. 3 and 4 was meaningless or ineffective. The French text of the Protocol governs its construction in case of any doubt and it was argued that the word "avis" bears a somewhat stronger meaning than "notice", but I do not need to base any conclusion on that argument as I am satisfied that both "a notice" or "un avis" mean at least something which is in a form calculated to attract attention.

As I have pointed out, Mr. Justice Casey in the course of his reasons for judgment in the *Ludecke* case, indicated his view "that on the matters of fact as to whether the 'statement' was sufficiently legible the Convention should contain its own criteria" and he considered that it did not do so. Had he been considering art 3(1)(*c*) of the Protocol, the learned Judge might have reached a different conclusion as it appears to me that that article does contain its own criteria, namely, that the statement shall be in such form as to constitute a "notice". Even if it were accepted that the four and one-half point type in which the requisite notice is reproduced at the foot of the first page of the ticket is reasonably readable, it cannot, in my view, be described as noticeable and it is not in a form which would attract the attention of the passenger in contradistinction to all the other material printed in the same type on the ticket. In relation to a claim for loss of life, art. 3(1) of the Convention, as I have said, merely required "a statement" and furthermore under that article the absence of that "statement" did not preclude the carrier from limiting its liability provided that the ticket was

"delivered". The amended article as contained in the Protocol not only requires a "notice" but the absence of such "notice" denies the carrier the benefit of art. 22. The "notice" required by the Protocol and the statement required by the Convention are therefore two completely different requirements with radically different effects and with the greatest respect I think that the Court of Appeal erred in applying the reasoning which had been used in the *Ludecke* case in interpreting the Convention to the interpretation of the Protocol in the present case.

As I have indicated, I am of opinion that the four and one-half point type reproduction of the material required to be inscribed by art. 3(1)(*c*) of the Protocol was not a "notice" within the meaning of that article and accordingly the carrier is not entitled to avail itself of the provisions of art. 22.

For all these reasons I would allow this appeal, set aside the judgment of the Court of Appeal and direct that the question here submitted for determination be answered in the negative and that the respondent is not entitled to avail itself of the provisions of art. 22 of the First Schedule to The Hague Protocol so as to limit its liability to the appellants as to the amount of damages payable as a result of the death of the late Joseph Irving Stampleman at Tokyo International Airport on March 4, 1966, and as a result of the loss or destruction of the registered baggage of the said Mr. Stampleman, the check for which was incorporated in his ticket.

The appellants will have their costs both here and in the Court of Appeal.

SPENCE, J., concurs with RITCHIE, J.

PIGEON, J., concurrs with JUDSON, J.

DICKSON, J., concurs with RITCHIE, J.

Appeal allowed.

United States Government Memorandum

To: E/TT—M. Loy

From: OA/AL—Leopold Gotzlinger

Subject: Meeting of Working Group on Warsaw Convention, January 7, 1966

January 10, 1966

The entire meeting was devoted to reaching agreement on minor substantive changes and editorial changes in the Lowenfeld Draft Position Papers, and to clarification of the differences existing as to more major substantive points. L is to prepare a paper by Monday showing the various alternatives as to points in dispute, as well as agreed sections.

Areas of major disagreement are as follows:

1. *As to Acceptability of a $75,000 Fallback Position*: FAA favors the shift of all three positions listed under IV from the category of "Possible Further Fallbacks" to the category of "Acceptable Fallbacks." FAA would also add a fourth acceptable fallback position providing for $75,000 under straight Hague conditions, CAB and L are opposed.

2. *As to Acceptability of a Fallback Position Calling for $100,000 but without Provision for Attorney Fees*:* CAB does not clear US proposal or support of such a position. They would shift reference to it from III to IV.

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* To be added following word "Fees"—*and Provision Relating to Willful Misconduct.*

United States Government Memorandum

3. *Order of Fallback Positions*: L would not, under any circumstances, retreat to a $75,000 proposal before going down the whole list of fallback positions involving $100,000. FAA would retreat from $100,000 under Hague/Warsaw conditions to $75,000 under the same conditions, then propose $100,000 but without provision for additional recovery in case of wilful misconduct.

Mr. Mendelsohn said, in an aside, that he was sure the Department of State "would not favor wholeheartedly" a proposal that the Delegation should be authorized to support a $75,000 limit at Montreal. At best, the Department's stand might be "wishy-washy."

Mr. Wanner said that CAB would probably not approve a proposal for automatic insurance in the amount of only $66,600. Mr. Boyle argued that we should nevertheless remain open-minded toward proposals calling for absolute liability.

Mr. Lowenfeld announced that a meeting with John E. Stephen, General Counsel of the Air Transport Association, would take place on Monday, January 10, at 2:30. It is hoped that something can be learned about the carriers' position. Also, the attempt will be made to elicit Mr. Stephen's reaction as to the possible attractiveness to the carriers of a proposal involving the elimination from Warsaw/Hague of provisions for additional recovery in case of reckless action, but with addition of a provision for carrier liability without any proof of fault.

Attachment:

As stated.

United States Government Memorandum

FAA Proposal for Section III
of the Draft Position Paper for the
Montreal Conference

III. ACCEPTABLE FALLBACKS

In the event the primary position of the U.S. is not accepted, the U.S. Delegation is authorized to propose two additional alternatives in the following order of preference:

1. The U.S. Delegation may propose or support within the basic Warsaw/Hague system of limits of liability per passenger, amounts less than $100,000 down to the minimum figure of $75,000 per passenger including court costs and attorneys' fees. In conducting these negotiations, the U.S. Delegation should stop at the highest figure at which it is possible to secure a majority approval of the conference.

2. * In the event the U.S. Delegation is unable to obtain agreement by the majority of the conference on a limit of at least $75,000 per passenger including court costs and attorneys' fees within the framework of the present Warsaw/Hague system, it should then propose the figure of $100,000 per passenger including court costs and attorneys' fees but with elimination of the provision on exoneration in Article 20 and the exception for willful misconduct in Article 25.

* The FAA wishes to reserve its position on the desirability of a convention predicated on the principle that the airline is liable without fault to its passengers until after it has ascertained the views of the airlines and other interested parties on this question.

United States Government Memorandum

In the event this proposal fails to secure approval at the figure of $100,000 per passenger including court costs and attorneys' fees, the U.S. Delegation is authorized to propose or support lesser amounts down to a minimum figure of $75,000 per passenger including court costs and attorneys' fees. During this negotiation, the U.S. Delegation should stop at the highest figure on which it is able to secure agreement of a majority of the conference. In argumentation in support of this theory in a new convention, the Delegation may point out that this proposition would assure that any victim of an air disaster who could prove damages would be able to recover a reasonable amount without having to await the outcome of sometimes protracted and highly technical litigation attempting to prove negligence or willful misconduct on the part of the carrier or its agents. The delegation may also point out that while liability without fault is novel as applied to personal injury or death claims by passengers in international air transportation, it is not novel in other areas of aviation law or in law generally.

It should be made clear that the suggestion of the United States Delegation for liability without fault would not be equivalent to automatic insurance, since it would still require proof of damages in each case. Thus, under this system, as under the basic U.S. proposal, the awards or settlements would still be based on the standards applicable in each country for compensation for personal injury, taking into account earning capacity, de-

United States Government Memorandum

gree of dependence of survivors, life expectancy, etc.

In short, while under this proposal there would be some shift from the proposal in paragraph II, the advantage to the traveler and to the carrier would be roughly balanced.

Letter from Secretary of Transportation to President of the Senate

THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590

June 24, 1988

Honorable George Bush
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

This letter requests that the Senate renew active consideration of Montreal Protocols 3 and 4 to the 1929 Convention for the Unification of Certain Rules Relating to International Transportation by Air (the Warsaw Convention). As discussed below, these Protocols are currently pending before the Senate.

The Warsaw Convention establishes a uniform liability system for international aviation that has been in effect for over 50 years. However, while the Convention promotes uniformity of law in international transportation of passengers and cargo, it is badly in need of reform, particularly in regard to its outdated $10,000 limitation on recovery for death or injury in international air transportation. The United States has been dissatisfied with this low level of recovery since it became a party to the Convention in 1934.

U.S. discontent with the Warsaw Convention and its low limitation on liability is so strong that in 1965 the United States announced its intention to denounce the Convention, agreeing to remain a party only after carriers serving the United States signed the 1966 intercarrier Mon-

Letter from Secretary of Transportation to President of the Senate

treal Agreement, in which they waived the treaty limitation and agreed to accept liability up to $75,000 per passenger. However, even this higher limitation is inadequate and unfair by modern standards. Protracted and costly litigation almost inevitably results wherein victims of air accidents or their families seek to circumvent the limitation so as to recover an amount more in keeping with current standards of reasonable recovery for injury or death. The result is a system that is unpredictable, unfair, costly and confusing to the American traveling public.

The United States has participated actively in the negotiation of the three international agreements which modify and improve the Warsaw Convention, *i.e.*, the 1955 Hague Protocol, the 1971 Guatemala Protocol, and the 1975 Montreal Protocols. None of these agreements contain liability limitations sufficient in themselves to meet the Administration's concerns about providing adequate compensation for death or injury in international air transportation. However, for the reasons stated below, the Administration believes that Montreal Protocols 3 and 4 (the "Montreal Protocols"), if combined with an adequate supplemental compensation plan, will provide the traveling public an adequate and fair system of recovery.

Among their other improvements to the Warsaw Convention, the Montreal Protocols increase the possible recovery by passengers against carriers from approximately $10,000 in the unamended Convention to 100,000 Special Drawing Rights (SDRs) (approx. $136,000) in the Convention as amended by the Protocols. In 1977, the Ford Administration asked the Senate for its advice and consent to ratification of these Protocols and proposed that

Letter from Secretary of Transportation to President of the Senate

the 100,000 SDR Protocol limit be supplemented by an additional $200,000 recovery per passenger from a separate passenger-funded supplemental compensation plan. However, although this combined recovery of over $300,000 would have been substantially greater than the amount recoverable under the unamended Warsaw Convention (or under the intercarrier Montreal Agreement), it was nonetheless opposed by some Senators as inadequate. On March 8, 1983, despite strong support from the Senate Foreign Relations Committee, the Senate voted in favor of the Protocols by a margin of only 50-42, thereby effectively denying advice and consent to ratification. However, a motion for reconsideration (129 Cong. Rec. S2279) was entered, and the Protocols are still pending before the Senate.

In 1985, I initiated an effort to revise and improve the supplemental compensation plan. During the past several years, the Transportation Department has worked with representatives of U.S. and foreign air carriers, with the insurance industry, and with other U.S. Government agencies, to develop a new draft supplemental compensation plan that should respond to the concerns of those Senators who opposed the plan in 1983.

The new plan would eliminate the major concern of the Senate by creating a private insurance program with unlimited recovery per passenger for economic damages, subject only to a per incident, per aircraft, limitation of $500 million. It establishes procedures for the presentation of claims and their evaluation by air carriers and the insurance carrier, and includes a claim settlement inducement provision whereby a court may award costs, in-

Letter from Secretary of Transportation to President of the Senate

cluding attorneys' fees, if a settlement offer equal to two-thirds of the ultimate recovery under the plan has not been made within specified periods. The plan contemplates a passenger fee of about $5.00, or less, per round trip international ticket purchased in the United States, to be collected by air carriers and paid to a private insurance carrier. I have attached a current draft of the plan, which will no doubt be developed further during Senate consideration.

Apart from the increase of air carrier liability to 100,000 SDRs, the Montreal Protocols improve the unamended Warsaw Convention in several other important ways. They provide an additional category of jurisdiction for liability suits, based on the permanent residency of the passenger. Thus, U.S. servicemen, diplomats and other employees stationed overseas and traveling in international air transportation not including points in the United States would for the first time be able to pursue adequate recovery for personal injury and death in U.S. courts. Moreover, the Protocols improve the Warsaw Convention's rules relating to baggage, ticketing procedures, and cargo documentation, particularly in facilitating electronic data processing for both passengers and freight, thus removing some existing impediments to maximum utilization of aviation's inherent advantage, speed of transport.

More generally, adherence to the Protocols will enable the United States to remain committed to one of the most widely adhered to treaty systems, and will thereby foster the international uniformity of law which was the original goal of the Warsaw Convention. That the United States has not yet ratified the Protocols has been a matter of

Letter from Secretary of Transportation to President of the Senate

considerable concern to our major foreign aviation partners and, for the most part, has kept them from ratifying these Protocols.

In view of the many advantages of the Montreal Protocols and in view of the improvements in the new supplemental compensation plan—which have been made specifically to satisfy the concerns of the Senate—it is my hope that the Senate will reconsider granting its advice and consent to ratification of the Protocols, so that the inequities in the present Warsaw system may be corrected in the near future. We look forward with the Senate towards this important revision of U.S. adherence to the Warsaw Convention system.

Sincerely,

/s/ JIM BURNLEY
Jim Burnley

Enclosure:

Draft Supplemental Compensation Plan